90-229

Case No.

UNITED STATES SUPREME COURT

OCTOBER 1990 TERM

REES LLOYD, Petitioner, v. RICHARD T. LONG, Respondent.	Cal. Supreme Ct. No. S014029 Cal. Court of App. No. G006130 O.C. Sup. Ct. No. 35 98 28

Petition for Writ of Certiorari

to the Court of Appeal of the

State of California

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

A. Whether a state court application of its public accommodations and anti-discrimination statute to impose substantial civil damages on petitioner[1] who, while attending a lawful public political assembly, aggressively challenged the presence of respondent police officer who was present in his official capacity to covertly monitor the participants for official purposes, conflicts with decisions of this Court concerning political speech / petition and expressive association as protected under the First Amendment?

B. Whether a state court ruling that the availability of a judicial remedy justified imposing substantial civil penalties on petitioner for

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1. In addition to petitioner-defendant Rees Lloyd, two additional defendants were the American Civil Liberties Union of Southern California [hereinafter "ACLU"] and Linda Valentino.

employing forms of speech / petition protected under the First Amendment to effect the departure of a police officer, present in his official capacity to covertly monitor lawful public political activity, conflicts with decisions of this Court concerning political speech / petition and expressive association?

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REPORTS OF OPINION HEREIN

The opinion below appears as follows in the official and unofficial reports of the State of California.

Long v. Valentino, et al.,
216 Cal.App.3d 1287, 265 Cal. Rptr. 96 (1989) (as modified[1]).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked, by this Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth District, Division Three, its judgment having been entered December 22, 1989, as modified January 19, 1990, and a timely petition

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[1]. The Opinion, filed December 22, 1989, is set forth verbatim in Appendix B, as modified January 19, 1990, with the Opinion set forth with the modifications incorporated -- i.e. as it appears in the Official Reports. The Order Denying Rehearing, which was initially incorporated with the Order Modifying Opinion, is set forth separately at the end of Appendix B.

for hearing to the Supreme Court of California having been denied on April 19, 1990, pursuant to 28 U.S.C. sec.1257 and United States Supreme Court Rule 10.1(c).

STATE STATUTORY PROVISIONS AND POSSIBLE APPLICABILITY OF 28 U.S.C. sec.2403(b)

The instant Petition for Writ of Certiorari draws into question the constitutionality of California Civil Code secs.51, 51.5, 51.7 & 52(a) [Appendix F], as applied and interpreted herein, and consequently, 28 U.S.C. sec.2403(b) may be applicable.

STATEMENT OF THE CASE

A.

Preservation of Federal Issues Presented

Respondent-plaintiff Richard T. Long, a Newport Beach, California police officer, filed an action against petitioner-defendant Rees Lloyd and co-

defendant's ACLU and Linda Valentino[2], claiming negligent and intentional infliction of emotional distress and discriminatory ejection under the California Unruh Act.

Prior to trial, defendants filed a motion for summary judgment, asserting that their speech and conduct was protected under the First Amendment, barring civil damages therefor; and that defendants' rights were violated by the covert monitoring of their political activity by plaintiff Long when he was confronted. Said motion was denied. [ER[3] 20; 140-41]. At trial, the same

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2. All three defendants were jointly represented at trial, with attorney of record herein having been one of several counsel of record for all three defendants. ACLU had separate counsel on appeal prior to settling.

3. References to "ER" indicate the Excerpts of the Record which were prepared by counsel in lieu of the Clerk's Transcript of the Superior Court for purposes of the appeal below.

arguments were raised in trial briefs and proposed instructions. [RT 1073-75; ER 14-69a].

At trial in the Superior Court found and held, and instructed the jury, that "[t]he speech and conduct of each Defendant was subject to protections as free speech or association" -- i.e. protected by the First Amendment, in the sense that none of the established exceptions -- defamation, obscenity, imminent threat of immediate violence, or fighting words -- applied. [Appendix C5] [RT 718-23; ER 73]. The trial court submitted to the jury the Unruh Act discrimination claim[4] as to all

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4. The trial court directed a verdict and dismissed all of the negligent infliction of emotional distress claims [RT 722-23], the intentional infliction of emotional distress claims as to defendants ACLU and Valentino [RT 718-19], and all of the Unruh Act claims grounded on intimidation by threat of violence [RT 987-1018]. The trial court submitted to the jury the intentional infliction of emotional

defendants, but to accommodate the protected nature of defendants' speech and conduct, ruled that plaintiff must prove that he was actually ejected and that defendants' sole motivation was the fact that plaintiff was a police officer[5]. [Appendix C2-C6]

[RT 988; ER 72-75].

Over defendants' objections, the trial court refused to distinguish, in the Unruh Act instructions to the jury, between Long's official and private

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distress claim as to defendant Lloyd, but to accommodate the protected nature of his speech and conduct, added the element that plaintiff must prove that "Defendant Lloyd acted with actual malice." [Appendix C2] [RT 718-19; ER 71]. **The jury found that Lloyd did not act with malice, and entered a verdict in his favor on that claim.** [Appendix D7] [ER 114].

5. These two new elements appear nowhere in the Unruh Act, and have no support in any decisional law under the Act, prior to the decision herein.

capacities[6]. [Appendix C2-C6] [RT 1074-75; ER 39-40, 49, 57-61, 68-69]. The jury found against all defendants under the Unruh Act, apportioning damages as follows: $10,000. as to petitioner; $9,000. as to defendant ACLU; and $1000. as to defendant Valentino. [Appendix D1-D6]. With attorney's fees and costs added, the apportioned judgments were $46,016.51 as to petitioner Lloyd; $41,414. 86 as to ACLU; and $4601.65 as to defendant Valentino[7]. Defendants

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[6]. The jury was not asked to decide whether defendants were motivated solely by the fact that Long was a police officer present in his official capacity and at the direction of the Chief of Police, seeking information for official purposes. Conversely, the jury was not asked to determine whether the defendants were solely motivated by Officer Long's occupation, without reference to his official function or his activities in covertly gathering and recording information on the political views of ACLU and others, and reporting it to the Chief of Police.

[7]. The jury assessed $20,000. in damages, to which was added $72,033. in attorneys' fees and costs, which was

Valentino and Lloyd appealed[8].

Long did not cross-appeal and on appeal did not dispute any of the trial court's rulings.

Following issuance of its published opinion on December 22, 1989, Petitioner filed a timely Petition for Rehearing. On January 19, 1990, the Court of Appeal filed an Order Modifying Opinion, without modifying the judgment, and denied defendant Lloyd's Petition for Rehearing. [Appendix B45].

The Court of Appeal ruled [2-1] in its initial opinion that Valentino's conduct was protected speech and conduct under the First Amendment, that her involvement in the ultimate "ejection" of Officer Long was too attenuated, and that consequently the judgment against

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apportioned at 45% against ACLU, 50% against Lloyd, and 5% against Valentino.

8. ACLU, concerned about further financial exposure, settled with Long.

her was reversed and entered in her favor. [Appendix B1-B24].

The Court of Appeal also ruled [3-0] in its opinion, as modified, that Lloyd's conduct did constitute an ejection; that despite the protected nature of Lloyd's speech and conduct, it caused an unlawful discrimination; that even though Officer Long was indisputably "on duty"[9] and in his official capacity[10], performing purely official functions, he may assert

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9. Petitioner does not distinguish between on or off duty, since even on duty officers have certain personal rights. Rather, Petitioner urges that it **is the officer's capacity and function which determines whether he may assert personal rights or is circumscribed by the limits imposed upon the government which he is representing.**

10. The Appellate Opinion, indicates that Long's presence at the conference was "[w]ith the knowledge and approval of the police chief . . . ." The record reflects, however, that Long attended the conference at the express direction of the chief of police, [RT 36-38, 555-56, 660-62, 668, 691-92, 822-23, 928, 932-33], and Long stipulated to this finding of fact, [RT 37; ER 76].

personal rights and seek civil damages under the Unruh Act for being "given the bum's rush" in a political assembly in a public forum, **even though it was effected by protected forms of political speech, including the exercise of the right to petition a government official for redress of grievances.** [Appendix B25-B44]. The Court of Appeal further held that even if Officer Long was engaged in improper surveillance of protected political activity -- the Court appeared to believe he was [Appendix B29-B30, B34-B35]] -- such conduct did not justify defendants' use of protected forms of speech to effect his departure in a manner which was "stressful and humiliating . . . giv[ing him] the bum's rush." [Appendix B30-B34].

The Court of Appeal also "declined" to address the lawfulness of Officer Long's presence, as a defense to

petitioner's conduct, asserting that it was not properly raised by affirmative defense, although it was "belatedly raise[d] in [petitioner's] trial brief." [Appendix B33]. However, the defense was fully tried and argued to the trial court and jury [RT 1073-75; ER 14-69a], and the jury was explicitly instructed thereon [ER 77-78] while other instructions proposed by petitioner in respect to this defense were rejected [ER 85-88], all without procedural or pleading objection by plaintiff -- i.e. he did not contend at trial or before the Court of Appeal that the defense was not properly preserved or plead, or that its submission prejudiced him by unfair surprise. Pleadings may be amended to conform to the proof at trial, and issues may be tried with the consent of the parties. See Cal. Code of Civ. Proc. sec.473.

The Court of Appeal, however, then proceeded to rule on the merits of this defense as well. [Appendix B33-B35]. The Court of Appeal ruled that petitioner's failure to avail himself of available judicial remedies, both before and after he challenged Officer Long, and his resort to "self-help" in dealing with an officer engaging in covert and officially authorized monitoring of the lawful political activity, violated the officer's rights. [Exhibit B4, B33-B35]. The Court of Appeal viewed petitioner's conduct, in response to Officer Long's wrongful conduct, as amounting to an attempt to remedy a wrong by violating the officer's rights -- and concluded that "two wrongs do not make a right". [Appendix B34-B37]. The Court of Appeal dismissed petitioner's argument that because of Officer Long's status at the time that petitioner acted -- i.e. Long

was present and acting in his official capacity -- petitioner's actions were not a "wrong" and that self-help by use of protected forms of speech to induce him to cease his monitoring of the political assembly was itself fully protected activity under the First Amendment. [Appendix B4, B35-B37].

Finally, the Court of Appeal directed that Long recover further attorney's fees on appeal from petitioner, to be determined on remand to the Superior Court.

Thereafter, petitioner filed a timely Petition for Review to the California Supreme Court, which was denied on April 19, 1990. [Appendix A].

B.

Statement of Material Facts

On October 11, 1980, the American Civil liberties Union of Southern California held a legislative conference

in a local Newport Beach high school. This conference was open to the public, and was convened to educate individuals on civil liberties issues pending in national and local legislatures and to discuss strategies and approaches to dealing with them.

ACLU policy, as presented at trial, took the position that law enforcement monitoring of lawful public political activity, in the absence of probable cause of criminal activity, imminent danger of violence, or other immediate public safety concerns, is a violation of the First Amendment rights of those taking part in the activities; further, that covert monitoring presented an even greater infringement because the general prevalence of such activity could have a widespread chilling effect even when such monitoring is not occurring. ACLU was pursuing these policies by litigation--

e.g. a lawsuit against the Los Angeles Police Department Public Disorder and Intelligence Division [PDID]; by legislation -- e.g. a bill by Assemblywoman Maxine Waters that would have amended Penal Code sec.148 to exclude pure speech as a basis for "interfering with a police officer; and by initiative -- e.g. a local Los Angeles initiative establishing a civilian review board for complaints of police misconduct. In the PDID suit, one of the contentions was that community relations officers of the Police Department covertly attended ACLU public programs and press conferences.

The Conference included a Police Practices Seminar. Among the guest speakers were Assemblywoman Waters, to discuss her bill; Jeff Cohen, to discuss the aforementioned initiative campaign, which he had organized; and defendant

Linda Valentino, the director of a police-community relations project sponsored by the Friends Service Committee, to discuss the PDID litigation, in which she was a plaintiff, having been herself subjected to covert surveillance by PDID[11]. Petitioner Lloyd, then employed by the ACLU Foundation of Southern California[12] as a staff attorney, attended the seminar.

The conference was also attended by the Newport Beach Police Department's Community Relations and Press Officer, plaintiff Richard Long, who attended in plain clothes at the direction of his Chief of Police. Officer Long did not

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11. Other guest speakers invited and attending the conference included then Congressman Jerry Patterson and a deputy district attorney. Also invited as participants, but not attending, were State Senator Diane Watson and the Laguna Beach Chief of Police.

12. A separate sister corporation of the ACLU Southern California, it was not a party to this action.

identify himself as an officer to anyone, and when paying his admission fee and obtaining his name tag, did not sign the conference register. He also tape-recorded the address of the ACLU Chapter President, and took extensive notes on the political remarks of various speakers, including officials of the ACLU and guest speakers.

Following the conference, Officer Long rewrote his notes, had them typed, then destroyed the two hand-written drafts. Even the typed version (third draft) reflected notes of comments from speakers which were almost exclusively of a political nature, mostly on more controversial issues.

During the day, two persons attending the conference became suspicious of Officer Long, and reported him to attorney Ron Talmo, Orange County Chapter Legal Director for ACLU, who

believed he recognized Officer Long. After confirming Officer Long's identity by speaking with him, Talmo reported his presence to the Conference Chair, Meir J. Westreich, who separately informed Valentino and Lloyd of Officer Long's presence, and suggested that Valentino ask Officer Long to identify himself.

During the Police Practices Seminar, Valentino -- after remarking about police community relations officers spying on lawful public political activity-- asked; "Would you care to comment on that Officer Long?" Long did not respond, and Valentino completed her remarks. The final speaker then addressed the seminar. After that, as general discussion was about to ensue, defendant Lloyd asked Officer Long to identify himself, at which time he stood up. Lloyd then demanded that Long step outside to discuss his presence.

Long declined to leave, instead engaging in a colloquy with the people at the seminar. Guest speakers and others questioned Long, in varying degrees of upset and anger, as to his purpose and his intended use of his notes. Long insisted falsely that he was present in a purely private capacity, having attended on his "own time" and at his own expense. He also indicated that his notes would be "available" to the police department. He then stepped outside, and repeated his false assurances, at which time defendant Lloyd invited him back in. Long declined and left.

At trial below, Officer Long conceded and stipulated that he had attended in his official capacity at the direction of the Chief of Police, was paid for his time at the conference, and was reimbursed for his expenses in attending. He further asserted that he

attended to learn about ACLU's views concerning police community relations, and prepared his notes to assist himself in his intended report to the Chief of Police. He also admitted to taping the ACLU Chapter President.

Long testified that he thought at first "he was being called out", but that he did not believe then that Lloyd was trying to physically attack him, nor was he actually being challenged to fight or assaulted, merely that he thought matters "were heading in that direction", but never reached that point. [RT 611-15, 675-82, 690]. Further, Officer Long testified that he did not leave because of anything that Lloyd had stated to him, but rather because of the overall effect of what was said to him by many of the persons present. [Rt 610-12, 614-15, 619, 675-80, 1016]. Long expressly stipulated on the record that the trip into the

hallway with Lloyd was not an "ejection" -- notwithstanding Lloyd's statements demanding that he step outside to discuss matters -- relying instead solely on the overall atmosphere in the seminar room. [RT 1016].

Officer Long explained the discrepancies between his statements at the conference and his subsequent testimony as being based on his "misunderstanding" at the time he attended.

ARGUMENT

Where an invasion of the First Amendment right to free speech is involved, this Court will undertake an independent review of the entire record. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 n.50 (1982) (and Supreme Court cases cited therein); Cox v. Louisiana, 379 U.S. 536, 545 & n.8. (1965). "The fact that such activity is

constitutionally protected, however, imposes a special obligation on this Court to examine critically the basis on which liability was imposed," NAACP v. Claiborne Hardware Co., supra, 458 U.S. at 915 & n.50, including to the extent of disregarding any "'insubstantial findings of fact screening reality . . . where a claim of constitutionality is effectively made. . . .' [Citation omitted]." id., 458 U.S. at 924. Interpretation of the Unruh Act is clearly a question of law. See id., 458 U.S. at 912-15 & nn.47-49.

A.

Whether a state court application of its public accommodations and anti-discrimination statute to impose substantial civil damages on petitioner who, while attending a lawful public political assembly, aggressively challenged the presence of respondent police officer who was present in his

official capacity to covertly monitor the participants for official purposes, conflicts with decisions of this Court concerning political speech / petition and expressive association as protected under the First Amendment?

California's Unruh Act, an anti-discrimination, public accommodations law, as now conclusively construed by the California Courts, now stands as the first authority in the United States which permits a police officer engaging in covert surveillance to obtain civil damages for being subjected to a protected form of political speech or petition challenging his right to be present and engaging in his surveillance activities. The affirmance of this statute by the California courts, its conclusive construction to permit recovery of such civil damages, and a final civil judgment for what, on remand

will now exceed $65,000. against petitioner alone, are directly contrary to numerous decisions of this Court providing that purely political speech and association is absolutely privileged against such state-imposed civil or criminal penalties.

Moreover, so long as police officers can obtain such civil damages merely because they feel humiliated or embarrassed by aggressive speech directed to him concerning the performance of his duties, two results can fairly be expected: first, most people will be intimidated by the threat of such civil damages, and will refrain from exercising their constitutional right to challenge police officers by protected forms of speech and conduct; and second, covert police surveillance will flourish, with offending officers and police departments being confident that their illegal

activities can only be challenged in court, and not in the political realm.

Indeed, this application of a statute intended to protect individuals from arbitrary forms of discrimination in their daily, public affairs is now extended to prevent lawful political assemblies from engaging in peaceful, if aggressive, efforts to establish and maintain their right to be free of covert police surveillance. The California courts have effectively declared that even unlawful police spying is now shielded from public political speech unless proffered in the most courteous manner, and in dulcet tones.

Yet, there is an extensive body of cases which have declared, in one form or another, that such self-evidently political speech -- i.e. speech on matters of public concern or involving public officials or figures -- is

entitled to the highest degree of protection under the First Amendment. This protection has been applied to bar all forms of criminal and civil penalties for such speech, treating it as absolutely privileged from all government imposed penalties. See e.g. Hustler Magazine, Inc. v. Falwell, 485 U.S. ___, 108 S.Ct. 876, 880-82, 99 L.Ed.2d 41 (1988) (offensive nondefamatory speech concerning public figure absolutely privileged from civil damages remedies); Houston v. Hill, 482 U.S. 451, 461-62 (1987) (offensive, reviling speech directed to police officer, challenging the manner in which he is performing his official duties, absolutely privileged from criminal penalties); NAACP v. Claiborne Hardware Co., supra, 458 U.S. at 907-908, 913-16 (political speech, employing nonimmediate threats of violence and ostracism to coerce fellow

blacks to support political boycott and having effect of destroying boycotted businesses, absolutely privileged from civil damages); Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (statements concerning public officials uttered out of hatred absolutely privileged from criminal penalties).

The trial court herein ruled, the California Court of Appeal accepted, and Officer Long did not dispute before the California Court of Appeal or the California Supreme Court, that the forms of speech and conduct of petitioner were at all times protected -- i.e. not "obscenity", "defamation", "fighting words" or "incitement" to or "threats" of "imminent violence", which would strip the speech or conduct of its First Amendment protection. See e.g. Hustler Magazine v. Falwell, supra, 108 S.Ct. at 882; Houston v. Hill,

supra, 96 L.Ed.2d 398, 412-13; Garrison v. Louisiana, supra, 379 U.S. at 73.

Under Houston v. Hill, supra, no criminal penalties could have been assessed against defendant Lloyd for his protected speech or conduct herein, however "stressful and humiliating" the speech might have been to Officer Long. Under NAACP v. Claiborne Hardware Co., supra, no civil damages could have been assessed against defendant Lloyd for damaging Officer Long's occupation by coercing or inducing others, by peer pressure and humiliation and nonimmediate threats of violence, to "give him the bum's rush." Under Hustler Magazine, Inc. v. Falwell, supra, no civil damages could have been assessed against defendant Lloyd for his use of the most offensive, repugnant speech with

which he intentionally inflicted emotional distress on Officer Long. Under Garrison v. Louisiana, supra, no criminal penalties could have been assessed against defendant Lloyd for damaging public statements about Officer Long, uttered in hatred.

Yet, the California Court of Appeal has now conclusively ruled under California's public accommodations anti-discrimination statute, that petitioner could have publicly asked Long to leave; he could have yelled at him or screamed at him; he could have denounced his presence; he could have "refused service" to Long; he could have "privately ejected [him] under circumstances that did not cause a stressful and humiliating departure." But the Court of Appeal ruled that petitioner's protected speech / conduct was legally actionable under the Unruh

Act because Officer Long was publicly told that "he must leave"; that he "was given the bum's rush"; that his departure was caused under circumstances that were "stressful and humiliating". The Court of Appeal did not cite a single authority -- nor did Officer Long -- to support these remarkable and unprecedented distinctions.

In fact, NAACP v. Claiborne Hardware Co., supra, is clearly to the contrary. In that case, the victims of the "coercive" speech were all private persons or businesses -- i.e. they were not even public officials or figures. The NAACP had organized and enforced a boycott of businesses which it deemed to engage in discriminatory practices. To make it effective, various forms of concerted activity were used to coerce black people to comply with the boycott, including abstract threats of violence

toward and peer humiliation in Church of those who did not cooperate. The boycott itself was directed at businesses only, and successfully destroyed many of them, causing what the jury found to be $7,000,000. in damages.

This Court held that peaceful political speech and speech-related conduct is absolutely privileged and could not form the basis for civil damages liability, even though the merchants could prove actual and severe financial losses caused by the peaceful political speech. See NAACP v. Claiborne Hardware Co., supra, 458 U.S. at 908-917. This Court further declared that "(s)peech does not lose its protected character, however, simply because it may embarrass others or coerce them into action." Id., 458 U.S. 910 (emphasis added). See Organization for a Better Austin v. Keefe, 402 U.S. 415,

418-19 (1971). The NAACP Court reasoned that political speech is the highest order of speech protected under the First Amendment, see NAACP v. Claiborne Hardware Co., supra, 458 U.S. at 913, and that the "state . . . may not award damages for the consequences of nonviolent, protected activity." Id., 458 U.S. at 918. The Court added:

> "[t]o the extent that the court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction', it is flatly inconsistent with the First Amendment."

Id., 458 U.S. at 921.

Yet, under the formulation of the Court of Appeal, California courts may now impose civil damages on NAACP for the same protected, peaceful political conduct involved in NAACP v. Claiborne Hardware Co., supra, as violations of the Unruh Act. The NAACP, like ACLU, is

covered by the Unruh Act[13]. The objects of the boycott were discriminated against because of their occupation -- consumer businesses -- and were subjected to severe damages. The NAACP did not limit its speech to friendly, nonstressful requests or private efforts. The NAACP employed indisputably coercive forms of speech and conduct, which served to humiliate and economically destroy numerous private persons, merchants who were also "human beings".

The California Court of Appeal has ruled that the State of California, by statute, permits private and nonhumiliating protected speech to secure

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13. Defendants never contested that ACLU as an entity does "engage in business", as that term is jurisdictionally applied under the Unruh Act. But ACLU is also an essentially political organization whose activities-- especially a legislative conference on indisputably public issues in a public forum -- are protected by the First Amendment. See In re Primus, 436 U.S.412 (1978).

the departure of a police officer who is present as an official representative of government, but provides a civil damages remedy for forms of protected political speech/petition which have the effect of **publicly coercing** that departure or which **hurt the feelings** of the officer. By so doing, the California Courts have established a test by which the degree of protection certain political speech enjoys under the constitution is measured by the content and effect of the speech, and the intent of the speaker. This too is unprecedented, and indeed there is considerable authority that such considerations are forbidden when applied to protected forms of political speech in a political forum. See NAACP v. Claiborne Hardware Co., supra, 458 U.S. at 909-910 (no civil damages permissible for "coercive effects" of protected political speech); Hustler Magazine v.

Falwell, supra, 108 S.Ct. at 880-81 (motives irrelevant in public debate about public figures); Garrison v. Louisiana, supra, 379 U.S. at 73-75 (same for public officers). The salient factor in all of the aforementioned cases, establishing an absolute privilege from all government imposed criminal or civil penalties for certain types of speech, is its essentially political character, occurring in a public forum.

> "We have long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.' . . . . (citations omitted). 'Speech concerning public affairs is more than self-expression; it is the essence of self-government. (citations omitted). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values' and is entitled to special protection.' (citations omitted)."

Dun & Bradstreet v. Greenmoss Bldrs., supra, 472 U.S. at 758-59[14].

Speech / petition in a public forum created by designation of the state for expressive activity[15] may be subjected to reasonable regulations as to time, place and manner, so long as they are content neutral and narrowly tailored to serve the governmental interest without prohibiting the speech / petition. See Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 44-46 (1983); Boos v. Barry, 485 U.S. ___, 108 S.Ct. ___, 99 L.Ed.2d 333, 345 (1988).

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14. Accord, Hustler Magazine v. Falwell, supra, 108 S.Ct. at 882; FCC v. League of Women Voters, 468 U.S. 364, 381-82, (1984); Bolger v. Young Drug Products Corp., 463 U.S. 60, 64-5 (1983); NAACP v. Claiborne Hardware Co., supra, 458 U.S. at 913.

15. Public schools, by virtue of the Civic Center Act, see Cal.Educ.Code secs.40041-47, are made available to public use for expressive activity during hours when school is not in session, and to the extent used in that fashion are "public fora".

Yet, the California Court of Appeal completely ignored these well-established distinctions based on the political nature of the protected speech and its occurrence in a public forum[16]. Thus, in its Opinion, the Court of Appeal poses three illustrative examples as analogous to the facts herein. Each illustration-- a car rental agency, a restaurant and a transportation company -- involves a purely commercial enterprise, engaging in commercial activity, without any hint of any political content or that the locus of the activity is a public forum as understood in First Amendment

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16. Not only does the Court of Appeal fail to address the special constitutional protection normally afforded political assemblies and speech in a public forum, it argues, to the contrary, that the fact that the conference was a "public meeting" protected Officer Long's right to civil damages for being "ejected" by pure political speech / petition which was "stressful" and "humiliating" to Officer Long.

jurisprudence[17]. [Appendix B36]. However,

> "[w]hile States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case."

NAACP v. Claiborne Hardware Co., supra, 458 U.S. at 913.

Indeed, the Unruh Act, on its face purports to regulate only commercial activity, barring arbitrary discrimination in public accommodations and other business and commercial activity. See Cal. Civil Code secs.51,52.

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17. In describing an officer's rights, the Court of Appeal also combined commercial and noncommercial contexts, as though they were interchangeable.

> "[Police officers] may not be refused service in a restaurant, denied an apartment, or ejected from a public meeting merely because of their occupation, whether working a shift or on vacation. We find defendants' position on this point, at least as articulated at oral argument, to be as reprehensible as the police abuses decried above."

[Appendix B30-B31] (emphasis added).

This Court, in analyzing the applicability and scope of such statutes, has focused its analysis on whether the entity in question is primarily a commercial or business enterprise or entity, as distinct from one existing for primarily First Amendment related purposes. See Board of Directors of Rotary Int'l v. Duarte, 481 U.S. 537, 548-50 (1987) (Rotary clubs covered by Unruh Act because First Amendment associational interests are "slight", if any); New York State Club Ass'n v. New York City, ___ U.S. ___, ___ S.Ct. ___, 101 L.Ed.2d 1, 16 (1988) (same for private clubs covered by New York ordinance); Roberts v. Jaycees, 468 U.S. 609, 614-15, 624-26 (1984) (same for Jaycees covered by Minn. law).

In so doing, this Court has expressly recognized that associations which exist for primarily political

purposes are not -- and could not be--covered by anti-discrimination enactments.

> "[The ordinance] does not require clubs 'to abandon or alter' any activities that are protected by the First Amendment. If a club seeks to exclude individuals who do not share the views that the clubs members wish to promote, the Law erects no obstacles to this end."

New York Club Ass'n, Inc v. New York City, supra, 101 L.Ed.2d at 16 (emphasis in original).

> "An individual's freedom to speak . . . and to petition the government for redress of grievances could not be vigorously protected from interference from the state unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."

Roberts v. United States Jaycees, supra, 468 U.S. at 622.

Yet, the California Appellate Courts have now interpreted the Unruh Act to prohibit concerted political activity of an indisputably political nature -- i.e. the ACLU and groups such as assembled at the ACLU Legislative Conference are barred by the Unruh Act from employing protected concerted political activity to "coerce" the departure of a police officer present for the official purpose of monitoring their speech and assembly. To make this statutory interpretation constitutionally palatable, the California Court of Appeal read into the statute substantial limiting factors when the statute is to be applied to public officials who, in their official capacities, are subjected to otherwise protected political speech/petition.

Thus, although the Unruh Act forbids all forms of "arbitrary discrimination" or denial of "full and equal

accommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever" see Cal. Civil Code secs.51, 52, such discrimination against an officer in his official capacity entitles the officer to civil damages only if the officer can also prove that he was "ejected"[18] either "publicly" or in a manner which was "stressful" or "humiliating"[19], and that the exclusive motivation of the discriminating person or entity is to

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18. This new element was fashioned by the trial court and adopted by the Court of Appeal without discussion, [Appendix B35-B36], much less citation to statute or case authority. There is none. On appeal, defendants did not dispute that Long was "ejected" in the sense that such conduct by defendants would normally constitute a constructive ejection under the Unruh Act if the conduct in question were not political in nature and directed to an official in his official capacity.

19. These refinements on the "ejection" element were added by the Court of Appeal in Opinion [Appendix B35-B37], without citation to statute or case authority. There is none.

discriminate based on his occupation as a police officer. [Appendix B34-B37].

However, the federal courts have uniformly held that laws regulating business practices do not apply to political activities. See New York Club Ass'n, Inc v. New York City, supra, 101 L.Ed.2d at 16; Brown v. Hartlage, 456 U.S. 45, 47, 52-57 (1982); NAACP v. Claiborne Hardware Co., supra, 458 U.S. at 913-15. Regulation of protected political activity must be explicit, and normally the courts will not impute such regulation into a statute which on its face regulates only commercial or business activity. See Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1254-55 & n.21 (9th Cir. 1982) cert. denied, 103 S.Ct. 1234 (1983).

Even when a statute is properly deemed a regulation of First Amendment

protected political activity, the statute would nevertheless be constitutionally defective unless it also contains carefully crafted provisions providing the "precision" and "narrow tailoring" necessary to limit the infringement of or adverse impact on protected speech. See Chicago Teachers Union v. Hudson, 475 U.S. 292, 303 & n.11 (1986) ("first amendment requires limiting provisions be carefully tailored to minimize infringement."). However, the provisions of "precision" which the trial court adopted and which were affirmed and refined by the Court of Appeal are constitutionally defective because they focus on the coercive effect of protected political activity, see NAACP v. Claiborne Hardware Co., supra, 458 U.S. at 909-910, 921, and the subjective motivations of the political speaker, see Hustler Magazine v. Falwell, supra, 108

S.Ct. at 880-81; Garrison v. Louisiana, supra, 379 U.S. at 73-75.

Under this new interpretation of the Unruh Act, political groups engaged in public political activity could no longer challenge the presence of anyone -- not even a "club seek[ing] to exclude individuals who do not share the views that the clubs members wish to promote," see New York Club Ass'n, Inc v. New York City, supra, 101 L.Ed.2d at 16. The Ku Klux Klan could not object to the presence of blacks in a way that is stressful to them; "pro-choice" groups could not publicly object to the presence of "right-to-lifers"; NAACP members could not attempt to embarrass or humiliate persons not participating in its boycott activities; Republicans could not use protected forms of speech to exclude Democrats from a Republican convention.

Clearly, this is not an acceptable interpretation of the First Amendment. This Court has made it clear that these public accommodations laws would not apply to prohibit or restrict political speech and association, as distinct from primarily commercial clubs and enterprises. See New York State Club Ass'n v. New York City, supra, 101 L.Ed.2d at 16; Board of Directors of Rotary Int'l v. Duarte, supra, 481 U.S. at 548-50; Roberts v. Jaycees, supra, 468 U.S. at 614-15, 624-26.

Petitioner used protected forms of political speech and conduct, in a purely political forum sponsored by a political organization conducting political activities. The issue of whether police officers may attend public political activities, in their official capacities for the purpose of monitoring peaceful and lawful political activity, is itself

a political question. The use of protected forms of political speech and conduct by a political organization or its members to effect the purpose of establishing their right to engage in such activity without being covertly monitored by a police officer in his official capacity is fully protected activity which the state may not constitutionally punish, whether civilly or criminally. Thus, the Unruh Act, as currently applied by the California Courts to prohibit petitioner's political speech, and upholding the civil judgment against him, is thus unconstitutionally applied.

B.

Whether a state court ruling that the availability of a judicial remedy justified imposing substantial civil penalties on petitioner for employing forms of speech / petition protected

under the First Amendment to effect the departure of a police officer, present in his official capacity to covertly monitor lawful public political activity, conflicts with decisions of this Court concerning political speech / petition and expressive association?

The State of California has gouged a new and unprecedented exception to the First Amendment, declaring that even when a police officer is officially engaged in unlawful monitoring of lawful political activity, the persons or groups being monitored are barred by the Unruh Act from engaging in political "self-help" by employing protected forms of political speech/petition to induce the officer to cease his unlawful actions and depart. The Court of Appeal cites no authority, and provides little legal analysis, to support this remarkable proposition. Instead, it declares that "two wrongs do

not make a right" and that the appropriate remedy is judicial relief. [Appendix B4, B33-B36].

The most obvious flaw in this reasoning is that it presupposes that the availability of a judicial remedy for official conduct by a police officer that infringes an individual's or group's constitutional rights precludes that individual or group from employing protected political speech or concerted activity to remedy the constitutional wrong-doing; further, that such protected political speech or concerted activity is therefore itself a second "wrong". This turns the First Amendment on its head, which first and foremost assures that persons or groups are secured in their right to engage in protected political activity, see NAACP v. Claiborne Hardware Co., supra, 458 U.S. at 909-10. In fact, the state is prohibited by the supremacy

clause from imposing any form of statutory conditions or limitations, including by provision of alternative "remedies", on federally secured constitutional rights. See Martinez v. California, 444 U.S. 277, 284 n.8 (1980) (to apply restrictive state procedures to federal constitutional claims, even in state courts, would "transmute a basic guarantee into an illusory promise").

Moreover, the petition right by definition protects the right of individuals and groups to target government officials for protected political speech and concerted activity, in order to attempt to induce the officials to comply with the political objectives of the speakers, particularly when in reference to their official duties. The courts, therefore, have treated speech concerning or directed to public officials differently than other

speech, thereby effectively "discriminating" against those officials. Defamatory speech directed toward public officials is not actionable, as it would be for other persons who are not public officials or figures, unless there is also proof of actual malice. See New York Times Co. v. Sullivan, supra (public official); Gertz v. Welch, supra (public figure)[20]. Malicious prosecution suits against police officers require special standards to balance the petition right against the tort policy involved. See MacDonald v. Smith, supra ("actual malice" standard for false petitions). "Fighting words" are defined more narrowly when directed towards police

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[20]. The Supreme Court first adopted the "actual malice" standard for defamatory speech concerning public officials, then later extended the same protection even to defamatory speech concerning private persons who become "public figures" based on public interest in them or some event to which they are connected.

officers than when directed towards other persons, "'and policeman are not exempt from criticism any more than cabinet ministers.'" See Houston v. Hill, supra, 482 U.S. at 462-63 & n.12 (citation omitted). Proof of bad motive may be controlling in many areas of tort law, but not in discussion of public figures. See Hustler Magazine Co. v. Falwell, supra, 108 S.Ct. at 881.

This special treatment is mirrored by special protections for such officials, in the form of immunity from civil damages flowing from their wrongful acts while acting in their official capacities. See Garrison v. Louisiana, supra, 379 U.S. at 74 (absolute immunity for defamatory publication in performance of official duty); Malley v. Briggs, 475 U.S. 335, 344-46 & nn.7 & 9 (1986) (qualified immunity for false arrest if reasonable, objective belief in probable

cause while acting in official capacity); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (qualified immunity for reasonable, objective ignorance of law while acting in official capacity).

> "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."

Garrison v. Louisiana, supra, 379 U.S. at 74.

The California Court of Appeal, however, dismissed the distinction between an official acting in his private and official capacities, noting that even when acting as an official representative of government, the officer is still "a human being", and therefore also entitled to seek civil damages when subjected to civil torts. [Appendix B34-37]. Yet, this Court rejected this argument when it was urged on behalf of

persons who are acting purely in a private capacity. See Hustler Magazine, Inc. v. Falwell, supra, 108 S.Ct. at 877-79 (Falwell was a "human being" and not a public official); NAACP v. Claiborne Hardware Co., supra, 458 U.S. at 916 & n.51, 921 (private businesses owned by "human beings", with no official connection, and private patrons coerced into cooperating with the boycott). Indeed, this Court held in NAACP that civil damages may not be awarded between private parties for protected political speech and conduct because such damages are a state remedy being enforced by the state courts. See id., 458 U.S. at 915-16 & nn.49,51.

Moreover, there is ample authority, in related contexts, that an official acting in a representative or official capacity is indistinguishable from the governmental entity which he represents,

in terms of liability and immunity. See Will v. Michigan Dept. of State Police, 491 U.S. ___, 109 S.Ct. ___, 105 L.Ed.2d 45, 57-58 (1989); Kentucky v. Graham, 473 U.S. 159, 165-66 (1985); Brandon v. Holt, 469 U.S. 464, 471 (1985). This Court made an observation that is useful in this case:

> "Petitioner asserts, alternatively, that state officials should be considered 'persons' under sec.1983 even though acting in their official capacities. In this case, petitioner named as defendant not only the Michigan Department of State Police but also the Director of State Police in his official capacity.
>
> "Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather a suit against the official's office. [Citation omitted]. As such, it is no different from a suit against the official's office."

Will v. Michigan Dept. of State Police, supra, 105 L.Ed.2d at 57-58. Thus, a

public official, acting in his official capacity, is subject to the same constitutional limitations and restraints applicable to the government he represents. The government, therefore, should not be permitted to indirectly avoid those limitations and restraints by affording its officials, acting in their official capacities, civil damages remedies for forms of political speech otherwise protected from government penalty.

The Court of Appeal also dismissed the application of the petition clause. [Appendix B35]. Yet, protected speech and assembly, when directed to a government official, by definition implicates the petition clause as well, and therefore is entitled to a higher order of protection under the First Amendment because of its express mention in the constitution. See Roberts v.

United States Jaycees, 468 U.S.609, 622 (1984) (free speech and right to petition not effective without correlative right to employ group effort)[21]. The right to petition government is protected whether or not the government wishes to hear it. See Smith v. Arkansas State Hwy Employees, 441 U.S. 463 (1979) (workers' entitled to proffer grievances but employer not required to respond). An official especially cannot complain at having received such petitions if he has invited it. See Givhan v. Western Line Cons. School Dist., 439 U.S. 410, 415-16 & n.4 (1979). In this case, Officer Long testified that his purpose in attending the conference was to learn ACLU's views

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21. Accord, McDonald v. Smith, 472 U.S. 479, 488 n.2, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985) (Brennan, J. concurring) (citing NAACP v. Claiborne Hardware Co., etc., exercise of right to petition often intertwined with concomitant rights to free speech and assembly).

on the scheduled topics -- including police monitoring of lawful public political activity, which is precisely what he received.

> "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. 'Speech is often provocative and challenging . . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises above public inconvenience, annoyance or unrest.' . . . .
> " . . . . The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."

Houston v. Hill, supra, 482 U.S. 451, 461-62.

Yet, once again, the California Court of Appeal simply dismissed this constitutional issue. Under the rule declared in the Appellate Opinion, had the facts in Houston v. Hill, supra

occurred at the ACLU Conference, and had the officer felt stressed or humiliated and responded by leaving the conference, that officer would have been entitled to civil damages under the Unruh Act.

Clearly, that is contrary to the clear import of this Court's holding in Houston v. Hill, supra, given the well-established rule that "what a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law . . . ." because the fear of civil liability might be "markedly more inhibiting than the fear of prosecution under a criminal statute." New York Times Co. v. Sullivan, supra, 376 U.S. at 277. Yet, under the Appellate Opinion herein, the rule in California is that no criminal penalties can be imposed, but civil damages are permissible.

Moreover, to permit such civil

sanctions for defendant's protected political speech/petition directed to an officer in his official capacity if it is "stressful" or "humiliating" to him

> "runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience."

Hustler Magazine v. Falwell, supra, 108 S.Ct. at 882[22].

The Court of Appeal simply ignores the fact that by providing public officials with such a civil damages remedy for speech directed at them in their official capacities, and concerning their official duties, the Court is restricting speech and petitions which may otherwise be directed to the government. The full breadth of political speech / petition afforded by the First Amendment cannot be maintained

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22. Accord, Terminiello v. City of Chicago, 337 U.S. 1, 4-5 (1949).

while also protecting officials from the incidental discomfort which such speech / petition may cause. Conversely, if public officials are to be afforded a civil damages remedy for being subjected to discomfiting speech / petitions directed to them in their official capacities and concerning their official functions, then a new and unprecedented exception to the constitutional protection for such speech / petition is being carved out of the First Amendment-- i.e. that direct challenges to a public officials' performance of his official duties cannot be done in a manner which will expose the official to humiliation, stress or public ridicule.

Such an unprecedented development in constitutional law is an important question of law which should be addressed by this Court. The consequences of this rule of law and the public awareness that

an individual has been burdened with a substantial monetary judgment of $46,000. for such protected political speech/petition, if left untouched, will be stunning. Any individual who chooses to employ hostile or aggressive forms of protected political speech/petition toward the government hereinafter will do so at the risk of exposing himself to substantial civil damages if its effects are to coerce or embarrass a public official. The chilling effect of such a rule on all forms of protected political speech that are antagonistic to the government or its officials is both obvious, and clearly a departure from existing First Amendment jurisprudence.

The plain fact is that the persons attending the conference had a protected First Amendment right not to associate with a police officer who wished to monitor their political activity for

official purposes, a right which the Unruh Act in no way limits. "Freedom of association . . . plainly presupposes a freedom not to associate. (Citation omitted.)" Roberts v. United States Jaycees, supra, 468 U.S. at 623. Accord, Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, supra, 475 U.S. at 302 n.9. Officer Long indisputably was present to monitor defendants' political activity, and in fact did so. Defendants and many others present plainly did not wish to associate with him if that was his purpose, and indeed it was.

The notion that the First Amendment does not protect political "self-help", when pursued by protected forms of speech or conduct as a means of pressuring the government or its officials to act in accordance with the desires of the speaker, strikes at the core of the First Amendment. To compel the speaker to

resort to judicial remedies instead would utterly transform the First Amendment from its primary mission: to protect the individual right to address hostile, provocative, challenging speech to government officials concerning political issues of public importance. Such a judicial precedent, if permitted to remain, would merely be a judicial surrender to the "'eternal temptation . . . to [punish] the speaker rather than to correct the conditions about which [defendants] complain,'" see Houston v. Hill, supra, 482 U.S. at 406 n.15. Plainly, the Unruh Acts as currently applied by the California Courts to sustain a civil judgment against petitioner, violates petitioner's First Amendment rights.

CONCLUSION

Petitioner urges this Court to accept for review, on Petition for Writ of Certiorari the aforementioned Issues Presented for Review, and vacate the judgment as it relates to him.

Dated: July 18, 1990

Respectfully submitted,

MEIR J. WESTREICH
HUGH MANES

By: Meir J. Westreich
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Defendant Rees Lloyd

Case No.

UNITED STATES SUPREME COURT

OCTOBER 1990 TERM

REES LLOYD,	)	
	)	Cal. Supreme
Petitioner,	)	Ct. No. S014029
	)	Cal. Court of
v.	)	App. No. G006130
	)	O.C. Sup. Ct.
RICHARD T. LONG,	)	No. 35 98 28
	)	
Respondent.	)	
	)	

Petition for Writ of Certiorari

to the Court of Appeal of the

State of California

APPENDIX OF PETITIONER

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FILED April 19,1990

ORDER DENYING REVIEW

AFTER JUDGMENT
BY THE COURT OF APPEAL

Fourth Appellate District,
Division Three,
No. G006130
S014029

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

RICHARD T. LONG, Respondent

v.

LINDA VALENTINO, Et Al., Appellants

Petitions for review DENIED.

LUCAS
Chief Justice

FILED DECEMBER 22, 1989
MODIFIED JANUARY 19, 1990

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RICHARD T. LONG, Plaintiff and Respondent, v. LINDA VALENTINO et al., Defendants and Appellants.	)	G006130 (Superior Court No. 35-98-28) **OPINION**

Appeal from a judgment of the Superior Court of Orange County, Henry T. Moore, Jr., Judge. Affirmed in part and reversed in part with directions.

Meir J. Westreich and Manes & Watson, Hugh R. Manes for Defendants and Appellants.

Stevenson, Epstein & DePasquale and Jeffrey M. Epstein for Plaintiff and Respondent. * * *

This is a novel case, a successful civil rights action brought by a police officer, Richard Long, against a chapter of the American Civil Liberties Union, a conference participant who spoke on the topic of police espionage at political meetings, and an ACLU attorney. [1] As the issues are framed by defendants Linda Valentino and Rees Lloyd, essentially three questions are presented: (1) Can the Unruh Civil Rights Act (Civ. Code, §51 et seq.) be violated by First Amendment protected speech? (2) Can private persons be held accountable for a violation of the act based on the use of words alone directed toward a police officer acting in an

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[1] The ACLU has since made its peace with Long and is no longer a party. The irony in this situation is obvious and brings to mind the words of the late singer and songwriter Jim Croce: "Sometimes you eat the bear, and sometimes the bear eats you."

official capacity? And (3) is it lawful for government agents to attend public political events to gather information concerning the speakers or the organization involved? [2]

The short answer to the first question is, the First Amendment does not shield a speaker who uses words alone to violate the Unruh Act, although the speech itself may not be the object of prior restraint (a problem not presented on this record). The second issue requires a qualified affirmative response in the context of this case. The third cannot be answered with any rule of universal application, and we

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[2] Other issues are raised but are either mooted by our discussion or subsumed in the resolution of the three major topics noted. There is no contention that the damages or attorneys fees assessed were excessive. (The judgment awarded $4,601.65 in damages against Valentino and $46,016.51 as to Lloyd.) We express no view on those matters accordingly.

make no effort to address it on the merits. Defendants did not seek relief on that basis via cross-complaint, nor did they assert Long's conduct as an affirmative defense in their answer. Moreover, we will hold that a violation of the Unruh Act cannot be defended on the basis that it was an allegedly justifiable response to another's transgression of the act. The law affords the means to prevent and redress alleged civil rights abuses by public officers and agencies; self-help amounting to a retaliation in kind is not one of them.[3]

We will conclude the judgment against Lloyd must be affirmed. The verdict must

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[3] Use of self-defense against an assault by a government official acting under color of authority, e.g., by a victim of an attempted rape, would still be permissible, of course. It is obviously not a violation of the Unruh Act to resist a criminal attack.

be set aside with respect to Valentino, however, because the tenuous connection between her words and Lloyd's reaction is insufficient as a matter of constitutional law to affix liability: The judgment against her amounts to an overbroad application of the Unruh Act and conflicts with federal and state constitutional guarantees of freedom of expression.

I.

Long was the Newport Beach Police Department Community Programs Officer. In that role he was the official police liaison with the community and the press and reported directly to the chief of police. He attended and organized various meetings in the city. In the fall of 1980, he read of an ACLU Legislative Conference in which police practices would be a topic. The meeting was advertised as open to the

public at a public facility, Newport Harbor High School, on October 11, 1980.

With the knowledge and approval of the police chief, Long appeared on that date. Attired in mufti, his usual dress when attending community events, Long paid the modest admission and lunch fees and indicated an interest in seminars dealing with the federal criminal code and police practices. He was given a name tag which he wore during the conference. Long did not sign the register, which did not ask for attendees' occupations, because, as he explained at trial, he was unaware of it. Long said he would have enrolled had his attention been drawn to the register. There was evidence others failed to sign in as well. No warning of any kind was given that representatives of government or law enforcement agencies were not welcome at

the conference. (Ironically, one police chief, who did not attend, was an invited guest.)

Long took extensive notes and also, surreptitiously it appears, tape-recorded a speech by the president of the Orange County chapter. Sometime during the morning, ACLU staff attorney Ronald Talmo recognized plaintiff from a recent television appearance as a police spokesman. Talmo asked the officer his reason for attending the conference, and Long told him he was there to hear any criticism that might be made of his department and to learn of the ACLU's perception of Newport Beach police. Talmo did not suggest Long was not welcome, but he notified Meir Westreich of the officer's presence.

Westreich was an ACLU board member and

chair of the conference. He was also a witness and counsel for Valentino in the trial court and continues to represent her on appeal. Talmo and Westreich discussed the matter briefly. Apparently by happenstance, Westreich then met sequentially with Valentino, Lloyd, and Ramona Ripston, Executive Director of both the ACLU and the ACLU Foundation, concerning what, if anything, should be done about Long's attendance. Westreich suggested to Valentino that she reveal the officer's presence during her part of a seminar on the subject of police surveillance of public meetings. The idea, according to Westreich and Valentino, was to warn the participants that a police officer was among them and to obtain an explanation of purpose from Long himself.

Valentino was an employee of the

"Friends Service Committee" and coordinator of its "Police Surveillance Project." At that time she was a plaintiff in an action against the Los Angeles Police Department involving the allegedly unlawful monitoring of political events. Community relations officers were accused of participation in that activity. During her presentation on the subject of police surveillance of public meetings and discussion of the Los Angeles litigation, Valentino turned to Long and, according to him, stated accusatorially, "Would you care to comment on that Officer Long?" At trial she denied knowing which member of the audience he was, however, and suggested it was pure coincidence that she might have looked in Long's direction when she issued her challenge.

Some 20 minutes later, during a

question and answer session after Valentino and the next speaker on the program finished, ACLU staff attorney Lloyd rose and asked Valentino whether a police officer was in attendance. She replied she was not sure, but had been told a Newport Beach policeman named Richard Long was in the audience. Lloyd then demanded that Long identify himself. Long did so; and Lloyd said, "I want you outside. I'd like to discuss some of the principles of the ACLU with you." Lloyd started to walk out, but Long remained in his seat. Lloyd then approached the officer and said, "I want you outside right now." His tone of voice "was pretty malevolent," according to Long. "He wasn't being nice about it." He then put a finger in Long's face and ordered him out again. Long refused, stating he did not have to leave and had done nothing

wrong. The impasse continued in this vein until Lloyd threatened to slap the officer or slap him with a lawsuit. The sentence was not completed apparently, but Long's testimony tended to support Lloyd's version that the latter was the import of the statement. Nonetheless, Lloyd's behavior was such that Long felt as if he were being invited outside to fight. Long rose and announced he would leave if allowed to speak first.

Officer Long then told the attendees he was not there to spy on them. He had a legitimate interest in knowing of any concerns they might have with respect to his department. Long would communicate what he learned to the police chief so "that we could do something about these problems." He added he was not attempting to interfere with their rights or freedom

of speech but his own rights were being violated by being ejected. Long denied his notes were destined for police intelligence files, although he would make them available to the department if asked. He explained he was off duty and on his own time. (He would later withdraw that claim and admit the opposite was true.)

Long, who testified the incident made him "extremely upset," left the room. Outside, two elderly ladies apologized to him; and Lloyd, now "cordial and polite as could be," came up and stated, "now that you've identified yourself and everybody knows what your intentions are[,] come on back inside. You know, you can come back inside." Long refused, however, "[b]ecause I was embarrassed, I was humiliated by these people. You got all these people sitting there looking at you like you done

something wrong."

Three theories were advanced at trial against the ACLU, Lloyd, and Valentino: negligent and intentional infliction of emotional distress and unlawful discrimination under the Unruh Civil Rights Act. The court directed verdicts for defendants on the negligent infliction of emotional distress cause of action and that component of the Unruh Civil Rights Act claim grounded on intimidation by threat of violence (Civ. Code, §51.7). The court also determined there was insufficient evidence to submit the intentional infliction of emotional distress cause of action against the ACLU and Valentino to the jury; Long has not cross-appealed on those points. The issues of whether Lloyd intentionally and with malice subjected plaintiff to emotional distress and whether

all three defendants unlawfully discriminated against Long based on his occupation as a peace officer were submitted to the jury. Long prevailed on the latter theory against the ACLU, Lloyd, and Valentino.

II.

At the outset it is worth noting that Valentino and Lloyd do not argue the evidence is insufficient to support the jury's factual determination that Long was indeed ejected from the conference, nor do they contend physical expulsion from a public meeting based on an individual's occupation is permissible under the Unruh Act. They do claim a government agent" may be verbally ejected, however, without violating the law.

We consider the case against Valentino first because it is easily resolved.

Surprisingly, she does not directly attack the sufficiency of the evidence to support the verdict. The matter would be even easier to dispose of if she had. Nevertheless, she is correct that the First Amendment of the United States Constitution and article I, section 2, subdivision (a) of the Constitution of California protected the words she uttered and the Unruh Act would infringe on the constitutional guarantees of freedom of speech if its net could be so broadly cast. We will examine in the section following whether speech clearly calculated to effect a discriminatory expulsion of an individual from a public meeting because of his or her trade or occupation retains its First Amendment protection in the context of a civil suit for damages, but that is unnecessary with respect to the case

against Valentino.

The application of the Unruh Act to her words runs afoul of constitutional overbreadth restrictions; At the most she merely requested Long to identify himself. Her words taken literally only invited him to comment. When he chose to do neither, she concluded her presentation and sat down. Lloyd asked Valentino about her revelation well before he ejected Long. She simply gave a neutral and factually accurate reply. Her words were protected by the First Amendment.

In a special verdict the jury answered the following question in the affirmative: "Did Linda Valentino eject, or aid, incite or conspire in ejecting[] Officer Long from the police practices seminar?"

Indisputably, she did not eject the officer. And, beyond speculation and

conjecture, there is only the most meager circumstantial evidence to sponsor the notion that she acted in concert or conspired with Lloyd or anyone else to precipitate his departure.[4] The only

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[4] We respectfully disagree with the premises of our colleague's dissent regarding the disposition of Valentino's appeal. As explained below, to the extent she might have expected others to violate the Unruh Act by ejecting Long after she revealed his presence, we believe her speech was protected because there could have been no reason to expect a violent reaction against the officer and nothing less could suffice to avoid conflict with the First Amendment. We also reject the notion that she acted as part of a conspiracy because there was no direct evidence of that.

In an ordinary conspiracy case, Valentino's mention of Long's name and occupation might be taken as circumstantial evidence of her participation in a plot to cause his ejection; but we agree with these words of Justice Kaus (although they were not adopted by the other members of the panel): "Therefore, unless one is prepared to say that anyone who organizes a demonstration by high school students assumes the risk of their misbehavior, it must be that the First Amendment prohibits conspiracy prosecutions in this area where the People's case that the demonstrations, as planned, involved illegal means, rests

reasonable basis for the jury finding is that she incited the ejection.

Although Valentino does not attack that finding head on, she must prevail nonetheless. Where an invasion of a constitutionally protected right is alleged, in this case the First Amendment right to free speech, we must undertake an independent review of the entire record. (Cox v. Louisiana (1965) 379 U.S. 536, 545, fn. 8.) That examination yields but one conclusion: Valentino is entitled to judgment as a matter of law. Her words no more displayed a desire to incite a violation of the Unruh Act than wearing a jacket bearing the words "Fuck the Draft"

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entirely on circumstantial evidence." (Castro v. Superior Court (1970) 9 Cal. App.3d 675, 694.) There being no direct evidence of Valentino's participation in a conspiracy to eject Long, this theory was unavailable to plaintiff, even if the jury adopted it.)

demonstrated "an intent to incite disobedience to or disruption of the draft...." (Cohen v. California, (1971) 403 U.S. 15, 18.)

Even assuming we could sustain a finding that she intended to, and did, incite Lloyd's reaction, however, mere incitement of another to commit a nonviolent civil rights violation may not be punished. A speaker may freely attack institutions, trades, occupations, groups, races and ethnic majorities or minorities in this country in hopes that others will discriminate against them. Those who implement such abuses in response to an obnoxious exhortation may be punished under appropriate statutes. But one of the prices we pay to retain our liberty of expression is that the speaker may not, unless the speech is obscene or threatens

to produce an immediate violent reaction.

In Chaplinsky v. New Hampshire (1942) 315 U.S. 568, the Supreme Court agreed "'face-to-face words plainly likely to cause a breach of the peace by the addressee'" do not enjoy constitutional protection. (Id., at p. 573.) Violent reaction could not have been expected here, of course, since the addressee was a police officer. (See Houston v. Hill (1987) 482 U.S. 451, 462; Lewis v. City of New Orleans (1974) 415 U.S. 130, 135 (conc. opn. of Powell, J.).) Moreover, the incitement in this case was allegedly to violate the civil rights of another, not to provoke violence. Evils lesser than the immediate incitement of a violent reaction will rarely justify punishing speech. (See Schenck v. United States (1919) 249 U.S.47.)

In Terminiello v. Chicago (1949) 337 U.S. 1, a speaker who denounced Jews and Blacks was prosecuted under a municipal ordinance prohibiting breaches of the peace. The trial judge instructed that speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance" would violate the ordinance. (Id., at p. 3.) The Supreme Court struck down the ordinance, noting, "[A] function of free speech...is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea....[T]he

alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." (Id., at pp. 4-5.) By contrast, Valentino's words were comparatively mild.

In Feiner v. New York (1951) 340 U.S. 315, the Supreme Court did apply Chaplinsky to uphold an arrest where an inflammatory speech verged on the provocation of a violent reaction; but in Edwards v. South Carolina (1963) 372 U.S. 229, the high court seemingly retreated from even that position. There, civil rights demonstrators were asked to leave the grounds of the South Carolina Legislature because unsympathetic onlookers were becoming increasingly agitated. Nonetheless, the court refused to apply the "hostile crowd" exception because of the potential chilling effect on such protected

activities. (See also Cox v. Louisiana, supra, 379 U.S. 536.)

To reiterate: All Valentino did was ask a policeman to identify himself and later reveal his presence by name to the assemblage. She did not eject him or even ask him to leave. Nothing in the record suggests she sought his departure, and at trial she specifically denied an intention to provoke his eviction from the meeting. The only evidence is that she wished to inform the audience of his presence and learn his purpose. To be sure, she believed it was improper for police to attend such events; but the state may not constitutionally impinge upon her right to express that view to a policeman, an audience, or an audience containing a policeman. Nor may the state deny her the right to identify a policeman in a peaceful

public gathering or to ask the officer to comment or identify himself. (Houston v. Hill, supra, 482 U.S. 451.) Although she did not, she could have asked him to leave or expressed the opinion that he should.

III.

Lloyd went considerably farther, however. We must reject his sweeping claim that a violation of the Unruh Act accomplished by words alone is not actionable. It is true, as defendants argue, that speech is generally protected by the First Amendment, even if it is intended to interfere with the performance of an officer's duty, provide no physical interference results. (Houston v. Hill, supra, 482 U.S. at p. 469.) Here, the words did accomplish a physical event, Long's ejection; and, although this is not a criminal action, analogy to criminal law

is useful. Speech may be subject to criminal prosecution in a variety of contexts, e.g., attempted robbery, conspiracy, contempt of court, extortion, fraud, offers to sell narcotics, solicitation of various sorts, treason, and so on, provided only that it is accompanied by the appropriate mens rea. But the same words spoken without that mens rea, as in a play or movie, for example, enjoy complete constitutional protection.

The same is true in the context of the Unruh Act, which can be violated in a number of ways by words alone. If the speech is meant to, and does, offend the law, utterance of the words themselves may be protected; but the speaker is subject to the consequences. This state's version of the First Amendment, which is even more liberally construed (see Leeb v. DeLong

(1988) 198 Cal.App.3d 47, 52, fn. 1), literally says just that: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, §2, subd. (a), emphasis added.)

We would be shocked to hear the ACLU adopt the position that the words, "I won't rent to you because you are a (insert racial expletive)," are constitutionally protected in the sense that a racially based refusal to rent to a member of a minority must go unredressed merely because it was communicated directly to the victim. And defendants' attorneys correctly agreed at oral argument that an announcement such as "You can't eat in my diner because you are a lawyer, bricklayer, female, or Indian

chief" would be actionable under the Unruh Act, although words alone were the means employed to effect unlawful discrimination. (See Koire v. Metro Car Wash (1985) 40 Cal.3d 24, 325-36; Marina Point, Ltd., v. Wolfson (1982) 30 Cal.3d 721, 726.) Nevertheless, defendants do urge an exception for on-duty police officers, a proposition we consider in the following section.

Lloyd indisputably caused the ejection of Officer Long in contravention of the Unruh Act. That he accomplished this by words alone is immaterial for the same reason we do not literally punish a bandit for mere use of the words, "Stick 'em up, you moron." We punish him for the act of attempting to take the property of another by force and fear. It is of no moment that language was the vehicle to the goal in

this and our hypothetical case. Physical force alone could have been employed in either; and the words, while they may have contained a kernel of expression in each instance (e.g., "you moron"), amount to conduct designed to accomplish a direct violation of the law and not primarily a means of conveying an idea or point of view.

Long was not asked to leave; he was told he must do so. In our criminal law hypothetical, that is the difference between panhandling and attempted robbery. Words alone are not being punished in this case. The same speech in jest or on stage or screen has complete protection because it is just that: speech. Lloyd's words were considerably different, however. The jury was quite correctly instructed that if they were merely intended as free

expression, as opposed to accomplishing Long's expulsion from the meeting in violation of the Unruh Act, it should find for Lloyd. The issue was resolved against him, and the jury could hardly have reached a contrary verdict on this record.

IV

Finally, we turn to the core of the defense argument, that on-duty police officers are not subject to Unruh Act protection when they attend public political meetings for the purpose of gathering information concerning individuals or organizations. Before embarking on our analysis, we offer this caveat: We do not condone the practice of spying on and infiltrating political organizations and maintaining dossiers on public and private figures who are not suspected of criminal activity or of

being a threat to national security by organizations who are supposed to enforce the law. This court shares defendants' revulsion of such abuses of the executive power. And we are mindful that while Long spoke of a laudable purpose, improved police-community relations, the fact is he took copious notes and used a clandestine tape recorder even though, by all accounts, his department was not mentioned until Valentino disclosed his presence.

At the same time, however, police officers are literally on duty 24 hours a day under California law. (See People v. Corey (1978) 21 Ca.3d 738, 746; People v. Derby (1960) 177 Cal.App.2d 626, 631; Pen. Code, §§142, 830.1.) And they are as much entitled to the protection of the Unruh Act as any other citizen. They may not be refused service in a restaurant, denied an

apartment, or ejected from a public meeting merely because of their occupation, whether working a shift or on vacation. We find defendants' position on this point, at least as articulated at oral argument, to be as reprehensible as the police abuses decried above. Police officers as individuals have rights, too, and can bring actions for violation of those rights even though their injury has arisen in some way related to the performance of their duties. (City of Long Beach v. Bozek (1982) 31 Cal.3d 527, 538, fn. 9.)

A somewhat different problem is presented by the contention that a police officer on a mission to spy on individuals and organizations holding a public meeting may be excluded, however. We agree that is not quite the same as refusing to serve a beat cop a cup of coffee because the owner

does not like police. The fulcrum of defendants' argument is White v. Davis (1975) 13 Cal.3d 757. There, the California Supreme Court held a complaint alleging covert infiltration of classrooms on the UCLA campus by the Los Angeles Police Department for the purpose of compiling intelligence and dossiers on students and professors stated causes of action for violations of freedom of speech and assembly, as well as the state constitutional right of privacy.

The court leaned heavily on the concept of academic freedom in reaching its conclusions, however; and that is a major distinction between our facts and those of White. Participants in this public conference should have had very different expectations than the students and faculty of UCLA in the classroom. Well-known

politicians attended and spoke at this event. Press coverage was probable and may have been sought and obtained, for all we know. The ACLU itself advertised the conference in the press as open to the public without restriction. A classroom at UCLA is not a public forum; this meeting was.

Although defendants ask us to resolve the lawfulness of Long's conduct now, we must decline.[5] They included exactly no affirmative defenses in their answer, nor did they cross-complain against Long or the city to assert a violation of their civil rights. Had they cross-complained, we would have a very different case, perhaps, and

---

[5] Defendants did belatedly raise White in their trial brief. Assuming that was sufficient, White is so thoroughly distinguishable from the present situation, both legally and factually, it is essentially irrelevant.

one much more similar to White. But Lloyd did not resort to the legal process before or after he violated Long's rights under the Unruh Act. He chose to use self-help at the outset and has yet to properly tender the White issue.

Even if applicable to the present facts, White cannot excuse Lloyd's conduct. He is no more entitled to relief based on Long's allegedly improper activities than would be the owner of a diner, who after being denied an apartment because of her race, sex, or occupation, refused service to the offending landlord for the identical reason. Neither violation excuses the other. We have found no authority on this precise point and rely on a basic principle of our jurisprudence: Two wrongs do not make a right. Assuming Long was engaged in improper surveillance at the

instance of his department, the remedy selected by Lloyd cannot be condoned.

Defendants have also attempted to draw a distinction between officers merely on duty and those acting in an official capacity and have attempted to couple that argument with the strained contention that Lloyd's behavior was somehow protected by the constitutional right to petition the government. We are not impressed. (See City of Long Beach v. Bozek, supra, 31 Cal.3d at p. 538, fn. 9.) If the question was whether the City of Newport Beach could maintain an Unruh Act complaint in its own name based on Long's treatment, we would agree with the defendants. But while an officer acting in an official capacity does represent an institution, he is still a human being. He can be yelled at, screamed at, asked to leave. Free speech can be

exercised to the fullest in denouncing his presence, and that he must endure. But he may not be the object of a discriminatory ejection from a public meeting.

A car rental agency cannot refuse to rent an automobile to an officer because his purpose was to examine it for possible violations of safety standards. A restaurant cannot refuse service to a health inspector who was not hungry but did wish to check the food for flies. And a transportation company cannot refuse the fare of a civil rights investigator who wished to observe whether minorities were being required to ride in the back of the bus. These are examples of discrimination based on employment. It is of no moment that a government agent is acting for official as opposed to personal reasons when he becomes the object of unlawful

discrimination.

Ordinarily, the damages might not amount to much in such cases; although the agent's mission was affected, no personal insult was inflicted. But, as here, that will not always be the case. For example, Long could have been privately ejected under circumstances that did not cause a stressful and humiliating departure. His damages would have been minimal or nonexistent. But to return to our hypotheticals, he was not simply refused service; he was given the bum's rush as well. That conduct was not protected by the First Amendment or article I, section 2, subdivision (a) of the state Constitution.

The judgment is affirmed with respect to defendant Lloyd and reversed as to defendant Valentino with directions to

enter judgment in her favor. Valentino shall receive costs on appeal. Long is entitled to costs and attorneys fees expended to defend Lloyd's portion of the appeal as determined by the superior court upon return of the remittitur.

CROSBY, J.

I concur.

WALLIN, J.

SCOVILLE, P. J., Concurring and Dissenting.

I concur in the majority opinion insofar as it holds that speech alone may violate the Unruh Civil Rights Act. But I dissent from that part of the opinion which holds Valentino did not violate the Act because her speech was "neutral and factually accurate" and thus protected by the First Amendment. (Maj. Opn., ante, p.9.)

The jury expressly found that Valentino ejected, or aided, incited, or conspired in ejecting Long from the public seminar. A review of the record supports that finding. It is undisputed that Valentino was told prior to giving her speech on the subject of police surveillance of public meetings that there was a local police officer in attendance. She testified that ACLU representative Meir

Westreich told her she "should make it known" to the workshop that there might be an officer present and "see what happened." She agreed to do so, telling those in attendance "that meetings such as the one we were in at that moment were frequently targets of undercover officers that came and took notes and tape recorded and took down what people said and put them in files." She then looked out over the audience and asked, "Would you care to comment on that, Officer Long?" Not surprisingly, there was no response. When she was questioned later during the question-and-answer session whether a policeman was present, she replied that she had been led to believe an officer was in the audience. Long was asked to identify himself. When he did, Valentino watched silently as Lloyd, an ACLU attorney,

verbally ejected him from the room.

The majority characterizes Valentino's question as a mere request for Long to identify himself and an invitation for him to comment. That was her defense. It was also a defense roundly rejected by the jury. The majority then characterizes her statement as to Long's presence as simply a factually true reply. Speech alone is, as the majority points out, generally protected by the First Amendment. But speech which serves to accomplish a physical event, such as Long's ejection from the workshop, is not. The issue then is whether Valentino's speech was protected, or whether it effected a violation of the Unruh Act.

Viewed in the abstract, asking seminar participants if they would like to comment on the issues, or stating that a certain

person is in the audience, is , without more, protected speech. However, constitutional rights cannot be judged in the abstract; they must be judged in context. Accordingly, whether Valentino's speech was protected must be viewed in light of the totality of the circumstances. And I refuse to put blinders on to what was happening here.

Valentino asked Long if he would like to comment on the issues in order to single him out in front of the other participants as a police officer. Moreover, the questions was asked at the urging of an ACLU representative and with the intent of seeing what would happen. What happened probably did not come as much of a surprise to either Valentino or the ACLU representative who prompted her. Identifying Long as a police officer right

after telling the seminar participants the police frequently conduct surveillance of these meetings was likely to lead to but one conclusion: Long was a police surveillant. It was also likely to lead to Long's ejection. Either he would be forcibly ejected because he was there in his official capacity, or he would be humiliated into leaving even though he was there in his personal capacity. Indeed, after he assured Lloyd he was there in his personal capacity, Long felt too humiliated and distressed to go back to the workshop because the emotions of the participants ran so high.

Contrary to the majority opinion there is substantial evidence from which the jury could have concluded Valentino ejected Long from the workshop or conspired to eject him. "As long as two or more persons agree

to perform a wrongful act, the law places civil liability for the resulting damage on all of them, regardless of whether they actually commit the tort themselves. [Citation.]"(Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 784, emphasis in original.) "Furthermore, the requisite concurrence and knowledge '"'may be inferred from the nature of the acts done, the relation of the parties ... and other circumstances.'"'[Citation.] (Id. at p. 785.)

I would affirm the entire judgment.

SCOVILLE, P. J.

ORDER MODIFYING OPINION AND DENYING
PETITION FOR REHEARING
FILED JANUARY 19,1990
CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

RICHARD T. LONG, Plaintiff and Respondent, v.	)	G006130 (Superior Court No. 35-98-28)
LINDA VALENTINO et al., Defendants and Appellants.	)	ORDER

The opinion filed December 22, 1989, and certified for publication is modified as follows: [Modifications made in foregoing Opinion, Appendix "B".]

These modifications do not effect a change in the judgment. The petition for rehearing is DENIED.

CROSBY, J.

I concur. WALLIN, J.

I concur in the denial of the petition for rehearing. SCOVILLE, P.J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

RICHARD T. LONG, Plaintiff, vs. AMERICAN CIVIL LIBERTIES UNION, etc., et al., Defendants.	CASE NO. 35 98 28 JURY INSTRUCTIONS GIVEN BY COURT [PARTIAL]

JURY INSTRUCTION NO. 7 (REV.)

Officer Long may recover under Claim number 2, as to Defendant Lloyd only, if he proves that he suffered severe emotional distress proximately caused by the outrageous unprivileged conduct of Defendant Lloyd, done either with the intent to cause emotional distress or with reckless disregard of the probability of causing such emotional distress, and with actual malice.

The elements of a cause of action for intentional infliction of severe emotional distress are:

1. Defendant Lloyd engaged in an outrageous, unprivileged conduct;

2. Defendant Lloyd did so with the intent to cause, or with reckless disregard of the probability of causing emotional

distress;

3. The Plaintiff suffered severe emotional distress;

4. Such outrageous, unprivileged conduct of the Defendant was a proximate cause of the emotional distress suffered by the Plaintiffs; and

5. Defendant Lloyd acted with actual malice.

JURY INSTRUCTION NO. 31 (REV.)

In order for Officer Long to prevail in Claim No. 1 as to a particular Defendant, he must prove by a preponderance of the evidence all of the facts necessary to establish the following:

1. That officer Long was in fact ejected;

2. That the Defendant ejected Officer Long or aided or incited his ejection;

3. That the Defendant did so arbitrarily; and

4. That Officer Long was damaged.

JURY INSTRUCTION NO. 38(C)

It is the duty of the Court to decide which speech or conduct of the Defendants is protected as free speech and association. The speech and conduct of each Defendant at the conference are subject to protections as free speech or association. You are to treat these findings, made by the Court, as binding upon you.

You are cautioned that this instruction, though binding upon you, does not end your inquiry. A privilege to assert one's legal rights must be exercised for a lawful objective. It is your duty to determine whether Defendants were actually motivated by a desire to exercise or protect these rights; or whether, instead any Defendant was motivated solely by a desire to discriminate arbitrarily against

Officer Long because of his status as a police officer; or whether Defendant Lloyd was motivated by a desire to intentionally inflict emotional distress, with actual malice.

JURY INSTRUCTION NO. 40 (REV.)

As to Defendants ACLU and Linda Valentino, you must decide whether Defendants were motivated by a desire to discriminate arbitrarily, or, instead, by a desire to exercise or protect free speech or association rights.

If you find that Defendant ACLU or Linda Valentino were motivated solely by the fact of Plaintiff's status as a police officer, you should find for Officer Long and against that Defendant.

If you find that the desire to exercise or protect the rights of free speech and association, of themselves or other seminar participants, was a motivating factor of Defendants ACLU or Valentino, then you should find for those Defendants.

As to Defendant Rees Lloyd, you must

decide whether he was motivated by a desire to discriminate arbitrarily, or by an intent to inflict emotional distress or, instead, by the desire to exercise or protect free speech or association rights.

If you find that Defendant Lloyd was motivated solely by the fact of Plaintiff's status as a police officer; or solely by an intent to inflict emotional distress with actual malice; or solely by a combination thereof; you should find for Officer Long and against Defendant Lloyd.

If you find that the desire to exercise or protect the rights of free speech and association, of himself or other seminar participants, was a motivating factor of Defendant Lloyd, then you should find for Defendant Lloyd.

JURY INSTRUCTION NO. 35

You must consider it established that Officer Long attended the ACLU conference in his official capacity as the Community Programs Officer of the Newport Beach Police Department.

FILED AUGUST 17, 1987

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

RICHARD T. LONG, Plaintiff, vs. AMERICAN CIVIL LIBERTIES UNION, etc., et al., Defendants.	CASE NO. 35 98 28 JUDGMENT

This matter came on for trial on June 29, 1987, before the Honorable Henry T. Moore, Jr. Plaintiff appeared by his attorney, Jeffrey M. Epstein of Stevenson, Epstein & DePasquale; defendants appeared through their attorneys, Robin Meadow and Meir J. Westreich. Following deliberations, the jury returned special verdicts as follows:

SPECIAL VERDICT: PLAINTIFF'S CLAIM NO. 1:

We the jury in this action, find the following special verdict on the following questions submitted to us:

Question No. 1: Was Officer Long ejected from the police practices seminar?

Answer: "yes."

Question No. 2: Did Rees Lloyd eject, or aid, incite or conspire in ejecting, Officer Long from the police practices seminar?

Answer: "yes."

Question No. 3: Was Rees Lloyd motivated solely by the fact that Officer Long was a police officer, and not by any desire to exercise or protect rights of free speech or association of himself or other seminar participants?

Answer: "yes."

Question No. 4: Was Rees Lloyd acting

as an agent of the ACLU within the course and scope of his authority?

Answer: "yes."

Question No. 5: Did Linda Valentino eject, or aid, incite or conspire in ejecting, Officer Long from the police practices seminar?

Answer: "yes."

Question No. 6: Was Linda Valentino motivated solely by the fact that Officer Long was a police officer, and not by any desire to exercise or protect rights of free speech or association of herself or other seminar participants?

Answer: "yes."

Question NO. 7: Was Linda Valentino acting as an agent of the ACLU within the course and scope of her authority?

Answer: "yes."

ASSESSMENT OF DAMAGES

If you have found that any of the defendants are liable to Officer Long on Claim No. 1, you must now decide how much to award Officer Long against those defendants.

Defendant Lloyd is liable if you answered Questions No. 1,2, and 3 "yes."

Defendant Linda Valentino is liable if you answered Questions No. 1,5 and 6 "yes."

Defendant ACLU is liable (a) if you answered questions 1,2,3, and 4 "yes" or (b) if you answered Questions No. 1,5,6 and 7 "yes" or (c) if you answered all seven questions "yes."

IF YOU HAVE NOT FOUND ANY OF THE DEFENDANTS LIABLE, SIGN AND RETURN THIS VERDICT. OTHERWISE, ANSWER QUESTION NO. 8.

Question No. 8: State the amount of actual damage sustained by Officer Long

(including the $250 minimum).

Answer: $20,000.

IF YOU HAVE FOUND THAT ONLY ONE DEFENDANT IS LIABLE, SKIP QUESTION NO. 9 AND ANSWER QUESTIONS NO. 10 AND 11. OTHERWISE, ANSWER QUESTIONS NO. 9, 10 AND 11.

Question No. 9: You must now apportion the amount stated in your answer to Question No. 8 among the defendants you have found liable. State how you wish to apportion your damage award (enter "0" for any defendant who you have found is not liable). Lloyd: $10,000. Valentino: $1,000. ACLU: $9,000. Total: $20,000.

The total must equal the amount stated in your answer to Question NO. 8.

Question No. 10: Do you wish to award Officer Long more than the amount stated as to any of the defendants in your answer to

Question No. 9?

Answer: no.

DATED: July 22. 1987 EVE JACKSON

SPECIAL VERDICT: PLAINTIFF'S CLAIM NO. 2.

We the jury in this action, find the following special verdict on the following questions submitted to us:

Question No. 12: Did Rees Lloyd intentionally inflict emotional distress on Officer Long?

Answer: "yes."

Question No. 13: Do you find, on the basis of clear and convincing evidence, that Rees Lloyd acted with actual malice toward Officer Long?

Answer: "no."

DATED: July 22, 1987 EVE JACKSON

On the basis of the jury's special verdicts, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiff Richard T. Long shall have and recover judgment against the defendants severally as follows:

a. The sum of $10,000 as against Rees Lloyd; and

b. The sum of $1,000 as against Linda Valentino.

c. The sum of $9,000 as against the American Civil Liberties Union;

2. Plaintiff Richard T. Long shall have and recover his costs of suit, including out-of-pocket disbursements as provided by law in the sum of $_____ and reasonable attorneys fees in the sum of $_____, for a total of $_____, to be apportioned among the defendants as follows:

a. Rees Lloyd _____

b. Linda Valentino _____

C. American Civil Liberties Union____

THE CLERK IS ORDERED TO ENTER THIS JUDGMENT.

DATED: AUGUST 17, 1987

_____

HENRY T. MOORE, JR.,

JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

(MINUTE ORDER)

Court convened at 3:30 p.m., October 7, 1987, in Dept. 31, Hon. Henry T. Moore, Jr., Judge, presiding.

Proceedings were had in Case 35-98-28, LONG VS. AMERICAN CIVIL LIBERTIES UNION, ET AL.

The Court having taken the matter under submission on October 6, 1987, now rules as follows:

In accordance with Civil Code Section 52(a) [Unruh Civil Rights Act], the Court awards attorney's fees of $65,000.00 to Plaintiff Richard T. Long. This amount together with the costs of $7,033.02, for a total of $72,033.02, shall be apportioned among the defendants as follows:

To American Civil Liberties Union--45% or $32,414.86.

To Linda Valentino--5% or $3,601.65.

To Rees Lloyd-- 50% or $36,016.51.

ENTERED 10/7/87.

(Mailing and execution of this certificate occurred October 7, 1987, Santa Ana, California. [By County Clerk]

TEXT OF RELEVANT STATUTORY PROVISIONS

"Section 51. Unruh Civil Rights Act; Equal Rights; Business Establishments.

"This section shall be known and may be cited as the Unruh Civil Rights Act.

"All persons within the jurisdiction of this State are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

"This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or blindness or other physical disability."

"Section 51.5. Discrimination, Boycott, Blacklist, etc.; Business Establishments; Equal Rights.

"No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, refuse to by from, sell to, or trade with any person in this state because of the race, creed, religion, color, national origin, sex, or blindness or other physical disability of the person or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers.

"As used in this section, 'person' any person, firm, association, organization, partnership, business trust, corporation or company."

"Section 51.7. Freedom from Violence or Intimidation.

"(a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive.

. . . .

"Section 52. Denial of Civil Right; Damages; Civil Action by People or Person Aggrieved; Intervention; Unlawful Practice Complaint.

"(a) Whoever denies, or who aids, or incites such denial, or whoever makes such discrimination, distinction or restriction on account of sex, color, race, religion, ancestry, national origin, or blindness or other physical disability contrary to the provisions of section 51 or 51.5 is liable for each and every such offense for the actual damages, and such ammount as may be determined by a jury, or a court sitting without a jury, up to the maximum of three times the amount of actual damages but in no case less than $250., and such attorney's fees as may be determined by the court in addition thereto, suffered by any person denied the rights provided in section 51 or 51.5."

90-229

UNITED STATES SUPREME COURT

OCTOBER 1990 TERM

RES LLOYD, Petitioner, vs. RICHARD T. LONG, Respondent.	Cal. Supreme Ct. No. S0140291 Cal. Court of App. No. G006130 O.C. Sup. Ct. No. 35 98 28

Petition for Writ of Certiorari

to the Court of Appeal of the

State of California

BRIEF IN OPPOSITON TO

PETITION FOR WRIT OF CERTIORARI

Law Offices of
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Attorneys for
Respondent
RICHARD T. LONG

UNITED STATES SUPREME COURT

OCTOBER 1990 TERM

RES LLOYD,	)	Cal. Supreme
	)	Ct. No. S0140291
Petitioner,	)	Cal. Court of
	)	App. No. G006130
vs.	)	O.C. Sup. Ct.
	)	No. 35 98 28
RICHARD T. LONG,	)	
	)	
Respondent.	)	
	)	

Petition for Writ of Certiorari

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Respondent
RICHARD T. LONG

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his job as the Community Programs Officer. The majority of those meetings took place during his off duty hours; some time after 5:30 p.m. Monday through Friday or on the weekends. (R.T. 511-512)

Richard Long worked very hard at fulfilling his duties as the Community Programs Officer. As part of his duties, Richard Long had appeared at community meetings on approximately 100 occasions prior to the ACLU Conference. In addition, he had appeared on TV, on all of the major and local networks, approximately twenty-five times prior to the ACLU conference. In fact, during the weeks just prior to the ACLu conference, Richard Long appeared on all of the major local channels on t.v. approximately six or seven times. (R.T. 774, 29, 516-517).

On Friday, October 10, 1980, the very day before the ACLU Conference, an event was held within the City of Newport called the "Cops and Kids Picnic." Richard Long had come up with

the idea to have this event in order to build better relations between the police officers and the children of the City of Newport. He had worked quite extensively to organize and put on the event, which proved to be quite successful, and some of his appearances on the t.v. during the week prior to the ACLU Conference dealt with his efforts on the Cops and Kids Picnic. (R.T. 524-531)

The ACLU Conference was extensively publicized throughout the area as a conference open to anyone who paid their admission fee. There was never any indication in any of the publicity, nor at the conference itself, that certain people were not welcome to attend the conference. (R.T. 83, 130, 426, 635)

Richard Long decided to attend the ACLU Conference after reading about the conference in the newspaper. The article indicated the conference was open to anyone who wanted to attend and that they would be discussing police practices at the conference.

Since the conference was taking place at the Newport Beach High School and they were going to discuss police practices, Richard Long decided to attend the conference believing they would be specifically discussing police practices as it relates to the Newport Beach Police Department. (R.T. 551-552, 555)

One of the topics to be discussed at the conference was the causes of police abuse and the possible remedies to police abuse. In addition, the conference was to discuss legislation which had an impact on police practices. The subject matter of the conference, as indicated in the publicity regarding the conference, would be of interest to the Newport Beach Police Department and specifically to Richard Long as the Community Programs Officer. (R.T. 72-75, 810-812)

On October 11, 1980, Richard Long attended the ACLU Conference. Upon his arrival, he paid the admission fee and the lunch fee and told the person at the desk that he wanted to

attend the Federal Penal Code Seminar and the Police Practices Seminar. He was given a name tag bearing his name, which he wore on this shirt throughout the entire conference. At some time during the registration process a sign-up sheet was present in the are where persons attending the conference paid their fees. The sign-up sheet was used to compile the names and addresses of people attending the conference and did not require disclosure of the persons employment or any affiliation. Richard Long did not see a sign-up sheet and was not requested to sign one, but he would have signed the sheet had he seen it or had been asked to do so. Not everyone who attended the conference signed the sheet. Richard Long was dressed in civilian clothes, not in uniform, which is how he always dressed when attending any community functions. (R.T. 429-430, 434-436, 511, 557-559, 617)

There was not notice in any of the publicity regarding the conference, nor was

there any signs at the conference, nor by any other means, was it indicated that government employees attending the conference because of their jobs were not welcome. (R.T. 635)

Richard Long took notes at the conference. He took those notes so that when he sat down with the Chief of Police to discuss what was said regarding police practices, he could make a logical and complete presentation. Just like at any conference, he summarized everything that was being said, so that later he could utilize only that information which would have been relevant to his discission with the Chief of Police regarding what was said concerning police practices. He would have then trashed the notes after the discussion with the Chief of Police. (R.T. 565-568) Other people who attended the conference were taking notes. (R.T. 149, 450-451)

At some point between 10:00 a.m. and 12:00 noon Ron Talmo became aware that Richard Long was attending the conference. Ron Talmo

recognized Richard Long as the Community Programs officer for the Newport Police Department, after having seem him on TV sometime during the week prior to the conference. (R.T. 29-30, 192-193) Ron Talmo walked up to Richard Long and started a conversation with him. Ron Talmo told him he was at the conference because he had read about it in the local newspaper and had come to find out what the Newport Beach Police Department night have been doing wrong in the eyes of the people who were attending the conference. (R.T. 196-197, 563-563, 809-810) Despite being an ACLU staff attorney at the time, and despite the fact that he felt the presence of Richard Long at the conference was inappropriate, Ron Talmo never told Richard Long that it was inappropriate for him to be at the conference nor did he tell Richard Long that he should identify himself as a police officer to the people at the conference. (R.T. 199, 809-810)

Ron Talmo then finds Meir Westreich

and tells him of Richard Long's presence a the conference. Meir Westreich was on the Board of Directors of the ACLU and was the conference chairperson. Meir Westreich then accompanied Ron Talmo to the school auditorium, where Meir Westreich stopped inside to observe and look at Richard Long for approximately four to five minutes. Meir Westreich then stepped outside the auditorium in the hallway and discussed with Ron Talmo and Meir Westreich what to do with Richard Long regarding his presence at the conference. (R.T. 433, 438-439) This meeting with Ron Talmo and Meir Westreich occurred approximately four hours prior to the time, during the police practices seminar, when Linda Valentino first addressed remarks towards Richard Long.

Meir Westreich then meets with Linda Valentino, Ramona Ripston, and Rees Lloyd, in that order, regarding Richard Long. During each of these meetings, Meir Westreich discussed with each of these people what to do about Richard

Long. As part of the decision on what to do with Richard Long, it was agreed that Linda Valentino would mention Richard Long's name while she was discussing police spying. Rees Lloyd was the last person Meir Westreich met with to discuss what to do with Richard Long. This was the first time Rees Lloyd was told about Richard Long's presence at the conference. All of the discussions between Meir Westreich and Linda Valentino, Ramona Ripston, and Rees Lloyd occurred at least one hour before the police practices session began. (R.T. 66, 324-325, 369, 444-445, 814)

Despite the fact that the chairman of the conference, and a member of the Board of Directors of the ACLu, was aware of Richard Long's presence at the conference, and despite the fact that conversations were held amongst five different individuals regarding Richard Long, all of whom had connections with the ACLU including the executive director of the ACLu, no one ever approached Richard Long to fully

discuss his presence at the conference. No one approached Richard Long to tell him of their alleged concerns regarding his presence at the conference. No one every informed any of the people attending the conference that there was a police office who was attending the conference. It was not until two-thirds of the way through the police practices seminar, some four hours after Richard Long's presence at the conference was first discussed, that Linda Valentino mentioned Richard Long's name as she was addressing the police practices seminar regarding the topic of police spying. (See earlier citations to Reporter's Transcript and Reporter's Transcript 601-602, 814-815)

Ron Talmo, who was an ACLU staff attorney at the time, and who was the person who recognized Richard Long at the conference and discussed with Meir Westreich what to do about Richard Long, held the belief, at the time of the conference, that under no circumstances did a police officer who wanted to attend a public

meeting because of his job have a right to attend any public conferences. The only exception was if the police officer was specially invited to attend the conference. It was also the official position of the ACLU that if a police officer wanted to attend a public meeting in connection with his job and take notes regarding what was said at the meeting, that police officer could be excluded from the meeting. (R.T. 203-204, 128, 143-144, 149)

LEGAL BRIEF

INTRODUCTION

Although there are a number of headings, subheadings and different arguments presented in the Petitioner's opening brief, all of his arguments repeatedly center on one theme: that the First Amendment to the Constitution protects the defendants from any liability for their actions. This is the core of all of the Petitioner's arguments, and thus all of the

Petitioner's arguments must fall since the First Amendment does not immunize Petitioners from liability.

I. THE FIRST AMENDMENT DOES NOT IMMUNIZE THE DEFENDANTS FROM LIABILITY FOR VIOLATING STATE STATUTE

At the very opening of the Petitioner's legal argument portion of their brief they concede that they would have no defense to liability if they had used physical means to eject Richard Long from the meeting. (See Footnote 11, page 19 of Petitioner's Opening Brief.) However, they claim they are immunized from liability because the means used to eject Richard Long from the conference was speech.

The problem with Petitioner's position is that no court has ever held that the First Amendment is absolute in immunizing a person who utilizes speech as a means of achieving certain results from liability imposed by a statute. In

fact, both the United States Supreme Court and the California Court of Appeal have consistently ruled that the First Amendment does not immunize a person from liability for violating a valid statute.

The case of Goldberb v. The Regents of the University of California, 248 Cal. App. 2d 867 (First District 1967) is right on point. In that case, certain students claim that they were improperly disciplined by the University of California for protesting the arrest of a certain person. Id. at 870-873. The plaintiffs claimed that they were engaging in the exercise of their First Amendment rights of free political speech and assembly and that this immunized them from any discipline which might be imposed by the University of California. The Goldberg Court vigorously disagreed with that argument. The court stated that the plaintiffs were arguing that since they were exercising political speech, "they had constitutional right to do whatever, however, and wherever they

pleased." Id. at 878. In rejecting this argument the Goldberg Court made the following cogent observations:

> "That concept of constitutional law was vigorously and forthrightly rejected by the United Sates Supreme Court in Adderly v. Florida (November 13, 1966) 3 U. S.399....These cases recognize that it is not enough for the plaintiffs to assert that they are exercising a 'right' to claim absolute immunity against any form of social control or discipline, for it is well recognized that individual freedoms and group interests can and do clash....An individual cannot escape from social restraint merely be asserting that he is engaged in political talk or action.... Conduct, even though intertwined with expression and association is subject to regulation...."

Id. at 878-79 (emphasis) added and citations omitted).

The Goldberg Court also quoted extensively from the case of Konigsberg vs. State Bar, 336 U.S. 36 (1961). That case dealt with an individual who was denied admission to the State Bar of California because he refused to answer any questions pertaining to his membership in the Communist Party, not on the ground of possible self-incrimination, but on the ground that such inquiries infringed upon his First Amended rights. The plaintiff sued in court claiming his First Amendment rights were violated by the actions of the California State Bar. 336 U.S. at 37-40. The Supreme Court rejected the plaintiff's view that the First Amendment protected him from the liability of being denied access to the State Bar. The Konigsberg Court stated that "at the outset we reject the view that freedom of speech and association...as protected by the First and Fourteenth Amendments, are 'absolutes' not only in the undoubted sense that where the constitutional protection exists it must

prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment." Id at 49.

The Konigsberg Court then went on to state that the Supreme Court had consistently recognized two ways in which the First Amendment did not shield individuals from liability. This analysis by the Konigsberg Court is extremely central to the issues in the case at bar. The Konigsberg Court stated the following:

> "Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech or speech in certain contexts, has been considered outside the scope of constitutional protection.... On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally

> limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have ben found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interests involved."

336 U.S. at 50-51 (emphasis added and citations omitted).

This is the problem with all of the arguments advanced by the Petitioner. He fails to recognize that there are two ways in which the First Amendment will not immunize him from liability. One way is if either the form of the 'defendants' speech or if the speech was made in a certain context it would have been considered outside of the scope of constitutional protection. The trial court found, and so ruled, that the defendants' speech was not outside the scope of constitutional protection.

However, this does not end the inquiry. The First Amendment will also not immunize the defendants from liability, if liability is created by a regulatory statute not intended to control the content of speech, but which incidentally limits the exercise of First Amended rights, and the statute is found to be protecting a subordinating valid governmental interest. The trial court having found that this second way applied, let the case be presented to the jury. As will be more fully developed below, it is crystal clear that the trial court was correct in finding that the defendants' actions came within the second way in which the First Amendment will not immunize them from liability.

The fact that the trial court required the jury to determine the intent or motive of the defendants does not prevent liability on behalf of the defendants due to their claim or protection under the First Amendment. Proof of intent has always been allowed to show a

violation of a regulatory statute even though the conduct of the defendants also involves First Amendment rights.

The case of California Motor Transport Company v. Trucking Unlimited, 404 U.S 508 (1972), involved civil liability under the laws regulating monopolies. The plaintiffs in the trial court had alleged that the defendants had conspired to eliminate and weaken existing and potential competition, for the purpose of monopolizing the highway common carrier business in California, by institution state and federal proceedings in administrative agencies and in the courts to resist and defeat applications by the plaintiffs to acquire operating rights on the highways. Id. at 509-511. The defendants claimed that they could not be held liable under the Sherman Act, an antimonopoly regulation, because they were protected from liability by their First Amendment right to petition.[1]

The California Transport Court recognized that the defendants were exercising

their First Amendment right of petition. However, the court went on to state that the fact they were exercising that First Amendment right did not give them immunity from the regulatory anti-trust laws. 404 U.S. at 513. The Supreme Court held that despite the defendant's First Amendment claims, the plaintiffs had the right to prove that the defendants real intent was to create a monopoly in violation of the statute, and that their claim

they were exercising their First Amendment rights was really a "sham" to cover their real intent to create a monopoly. If the plaintiffs could prove they real intent was to create a monopoly, then they could recover under anti-

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[1] It is important to note that even the Petitioner concedes that the First Amendment rights of freedom and speech, petition and assembly are in actual practice intertwined together and that these rights are accorded the same import under constitutional analysis. (See Petitioner's Opening Brief, p. 19, fn. 13.)

trust law. Id. at 513-516. In a concurring

opinion, Justice Stewart explained that "the respondent's are entitled to prove that the real intent of the conspirators was not to invoke the processes of the administrative agencies and courts, but to discourage and ultimately to prevent the respondents from invoking these processes." Such an intent would make the conspiracy and attempt to create a monopoly and would create liability on the half of the conspirators under the anti-trust statute. 404 U.S. at 518.

This same result was reached in the case of Costello Publishing Company vs. Rotelle, 670 F.2d 10356 (District of Columbia Cir., 1986). In that case, the marketer of Catholic books brought an anti-trust action and an action for unfair trade practices against various officials of the Catholic Church in the United States. The defendants claim they were insulated from liability under both the anti-trust statute and the unfair trade practices statute because their actions were protected by

the Fist Amendment rights regarding religion. The court relied on the holding and rationale of the California Motor Transport Case that the defendants could not claim immunity from regulation based upon their First Amendment rights Id. at 1048-50.

The California Motor Transport Court made the following important points in ultimately reaching the holding stated above. Those important points were as follows:

> "It is well settled that First Amendment rights were not immunized from regulation when they are used as an integral part of conduct which violates a valid statute....First Amended rights may not be used as a means or the pretext for achieving 'substantive evils... which the legislature has the power to control.... If the end result if unlawful, it matters not that the means used in violation may be lawful."

California Transport vs. Trucking Unlimited, 404

U.S. at 514-15 (emphasis added). The petitioner relies heavily on the case of NAACP v. Claiborne Hardware Company, 458 U.S. 886 (1982), to support their position that the First Amended immunizes them from liability. The problem with the petitioners' reliance on that case is that the Claiborne Case was not a situation in which First Emended Rights were utilized as a means for achieving goals which were themselves prohibited by valid state statute. This very analysis was stated by the Claiborne Court itself after it held that the petitioner's activities were entitled to the protection of the First Amendment. After stating its holding, the Claiborne Court noted that this was not a case where they were "presented with a boycott designed to secure aims that are themselves prohibited by a valid state law." 458 U.S. at 916, fn. 49. (emphasis added). Thus, the Supreme Court itself distinguished the Claiborne Case from the case at bar.

The jury made the following specific

findings: that Richard Long was ejected from the police practices conference; that the defendants intended to eject Richard Long from the police practices conference; that they were motivated to eject Richard Long from the conference solely by the fact that Richard Long was employed as a police officer; and that the defendants were not trying to, nor motivated by any desire to, exercise or protect their First Amendment rights or the First Amendment rights of other conference participants. (App. 99-102)[2].

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2 The petitioner has never attacked the jury findings or verdict as being unsupported by the evidence. They did not attack the jury findings or verdict below, nor have they attached the jury findings or verdict on appeal as being unsupported by the evidence. Even when there has been a challenge to the sufficiency of jury findings or a jury verdict, where the evidence is in conflict an appellate court will not disturb the findings or verdict of a jury. B. Witkin, California Procedure, Vol. 9, Section 278, p. 289 (3rd Ed. 1985). Therefore, it goes without saying that where the verdict and

findings of a jury are not being attacked as being unsupported by the evidence, an appellate court must uphold the findings and verdict of a jury.

Thus, the evidence at the trial and the specific findings of the jury proved conclusively that the defendants were using their First Amendment rights as the means or pretext for achieving a substantive evil and, therefore, their First Amended rights will not immunize them from liability.

In the case of Givoney v. Empire Storage and Ice Company, 436 U.S. 490 (1949), the Supreme Court reaffirmed the rule that First Amended rights will not immunize a person from liability when those rights are sued as an integral part of conduct which violates a valid statute. The Giboney Court stated the principal as follows:

"It is true that the agreements and course of conduct here were as in most

instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed...Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible every to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society."

436 U.S. at 501 (emphasis added). If the appellate courts were to accept the argument of the petitioner, people would be able to achieve arbitrary discrimination in violation of the Unruh Act by means of their First Amended rights and that would make it practically impossible ever to enforce the Unruh Act.

In a case of United States vs.

O'Brian, 391 U.S. 367 (1968) the Supreme Court stated a four-part test to be used in determining when a government regulation can be enforced, and liability be imposed, despite the fact that it will result in an infringement of First Amendment rights. The O'Brian Court first noted that in its past cases it had used a variety of descriptive terms to characterize the quality of the governmental interest which is being protected by the statute. Those descriptive terms included the following: compelling; substantial; subordinating; paramount; cogent; and strong. Id. at 376-377. The O'Brian Court then articulated the four-part test as follows:

> "We think it is clear that a government regulation is sufficiently justified if: (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to

the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest."

391 U.S. at 377. As will be discussed more fully below, each of the elements of the test confirms the fact that the jury verdict should be upheld.

The first three portions of the test can all be analyzed in connection with an analysis of two cases, decided by the Supreme Court, which dealt with state anti-discrimination laws.

The first case was the case of Roberts v. United States Jaycees, 468 U.S. 609 (1984). In that case two local chapters in Minnesota of the Jaycees had been violating the national bylaws by admitting women as regular members. National Organization notified the local chapters that they were considering revoking the local charters because they had admitted women

to membership. Members of the local chapters filed a claim pursuant to the Minnesota Human Rights Act, which is an anti-discrimination statute. Id. at 612-17. The Roberts Court recognized that the enforcement of the Minnesota anti-discrimination act would result in an infringement of the First Amendment rights of the Jaycees. Id. at 622-23. The Supreme Court went on to state that the First Amendment rights could be infringed based upon the test announced in United States v. O'Brian. (Although the test was stated in somewhat different language, it is the same test as announced in United States v. O'Brian.) Id. at 623. The Roberts Court then went on to find that the anti-discrimination act was not aimed at the suppression of First Amendment rights and that the state of Minnesota had a compelling interest in eradicating discrimination and assuring its citizens equal access to publicly available goods and services. Id. at 623-24. In fact, the Roberts court stated that the goal of eliminating

discrimination "which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order." Id. at 624. Finally, the supreme Court found that the restriction on First Amendment rights was no greater than was essential to the furtherance of that compelling state interest. Id. at 626.

The second case is the Board of Directors of Rotary International v. Rotary Club, 95 L.Ed.2d 474 (1987). In that case the Rotary Club in California admitted three women to active membership and the Rotary International revoked the club's charter and terminated its membership in Rotary International. The local club and two of its members sued Rotary International for violation of the Unruh Act. Id. at 480-83. The Rotary Club court then went through the same analysis as it had in the Roberts Case. The court stated that the Unruh Act served a compelling state interest of the highest order in eliminating

arbitrary discrimination. Additionally, the court found that the Unruh Act promoted a state interest which was unrelated to First Amendment freedoms. Id. at 486-87. Finally, the Rotary Club Court held that the restriction on the Rotary Club's First Amendment rights was no greater than was essential to furtherance of the state's compelling interest in eliminating arbitrary discrimination. Id. at 486.

The two cases discussed above are directly on point to the case at bar. Those cases conclusively show that the Unruh Act is within the constitutional power of the state of California, that it furthers a compelling state interest of the highest order and that it is unrelated to the suppression of First Amendment rights. As will be discussed below, the infringement of First Amendment rights in this case is no greater than is essential to the furtherance of that compelling state interest of the highest order.

The application oft he Unruh Act to

prevent the defendants from ejecting a person from a public conference solely because of their employment will infringe, if at all, the defendants First Amendment rights no greater than is essential to the furtherance of that compelling state interest. The Unruh Act will not require the defendants to abandon or alter any of their service activities. It will not require them to abandon any of the basic goals that they have set up for themselves. Nor will it require them to be part of a group which would admit members with whom they would not want to be associated. Nor would the Unruh Act prevent them from expressing any views. It would simply prevent the defendants from arbitrarily discriminating against a person by ejecting them from a public meeting solely on the basis of their occupation and not out of any concern to protect their First Amendment rights. The defendants would still be able to go to Court to seek an injunction preventing a police officer or police department from attending a

public meeting.

It is extremely important to remember that the jury was instructed in such a way that the application of the Unruh Act to this case really placed no restriction on the defendants First Amendment freedoms. The trial court instructed the jury that if they found that the defendants were motivated at all to exercise or protect their First Amendment rights or the First Amendment rights of the other people attending the conference, then the jury must find in favor of the defendants. In other words, the Judge instructed the jury that they could find in favor of the plaintiff only if they determined that the defendants claim that they were protecting their First Amendment rights was s ham or a pretext. Thus, the trial court actually imposed no restriction on the defendants First Amendment rights and gave those rights absolute protection.

As can be seen through the entire discussion above, the appellants core argument

that the First Amendment protects them from any liability for their actions in this case is fallacious. The First Amendment does not protect the appellants from liability based upon the applicable law stated above, the facts of the case, the rulings and instructions of the trial court, and the findings of the jury. As the United States Supreme Court stated in California Motors Transport: "If the end result is unlawful, it matters not that the means used in violation may be lawful." 404 U.S. at 515. Thus, this Court must uphold the judgment below.

II. THE UNRUH ACT SHOULD BE APPLIED TO THIS CASE

The importance of the Unruh Act cannot be seriously debated. As was pointed out above, even the United States Supreme Court has recognized that anti-discrimination statutes serve a compelling state interest of the highest order. The interpretation of the importance of the Unruh Act in the California courts of Appeal

has been no less sweeping.

In Koire v. Metro Car Wash, 40 Cal.3d 24, 28 (1985), the California Supreme Court held that the Unruh Act is to be liberally construed with a view to effectuating the purposes for which it was enacted, and in order to promote justice. See also, Rotary Club of Duarte v. Board of Directors, 178 Cal.App.3d 1035, 1046 (1986). The California Supreme Court stated in the case of In Re Cox, 3 Cal.3d 205 (1970) the following:

> "The nature of the 1959 amendments, the past judicial interpretation of the Act, and the history of legislative action that extended the statutes scope, indicate that identification of particular bases of discrimination -- color, race, religion, ancestry, and national origin -- added by the 1959 Amendment is illustrative rather than restrictive. . . . Although the

> legislation has been evoked primarily by persons alleging discrimination on racial grounds, its language and its history compelled the conclusion that the Legislature intended to prohibit all arbitrary discrimination by business establishments. Finally, in 1961, the Legislature substituted 'all persons' for 'all citizens'. . .in order to broaden further the section and complete the consistent pattern of wide applicability of the section."

3 Cal.3d at 216 (emphasis added).

The Unruh Act's purpose is to prohibit all arbitrary or "stereotypical" discrimination. Koire v. Metro Car Wash, 40 Cal.3d at 35-36. A person cannot be excluded when that exclusion is based upon the persons "race, nationality, occupation, political affiliation, or age. . .". Marina Point, Ltd. v. Wolfson, 30 Cal.3d 721, 726 (1982) (emphasis added).

There is simply no basis for denying the Unruh Acts protection of an interest of the highest order under the facts of this case. As discussed earlier, it is an unchallenged fact that Richard Long was ejected from the conference solely on the basis that he was employed as a police officer. To this the petitioner says -- so what. The Petitioner takes the position that it does not matter that he ejected Richard Long from a public meeting solely on the basis that he was employed as a police officer because he accomplished this by exercising his First Amendment rights (the fallacy of that position was discussed above) and because the Unruh Act should not apply to a police officer who attends a public meeting in connection with his job duties. The fallacy of the latter argument will be revealed below.

As can be seen by the language of the cases quoted above, the Unruh Act is designed to protect police officers--as well as every other class of California residents--against the

effects of arbitrary discrimination. Police officers do not give up their rights when they put on the badge. Police officers are not merely an extension of the government entity for which they work, rather they are still individuals who have rights like any other individual in the state of California.

Under both state and federal law a police officer in the performance of his duty as both an agent of the government and as an individual is personally responsible for his conduct towards third parties. Police officers can be sued individually for tortious conduct committed in the line of duty and can be held personally liable for an award of punitive damages.

Consistent with the petitioner's other arguments regarding his immunity from suit based upon his claim of First Amendment rights, the petitioner states that because police officers represent the government he has no claim to constitutional or statutory protections extended

to members of any other trade or profession, who had initiated a suit for injuries sustained while performing work-related duties. The petitioner takes the untenable position that in order to avoid even the slightest infringement of rights enjoyed by one class of individuals, the courts should broadly eradicate rights which would otherwise be guaranteed to members of another class of individuals.

It is important to note that the California Supreme Court has already addressed the claim that suits initiated by police officers impermissibly threaten rights protected by the First Amendment. In the case of City of long Beach v. Bozek, 31 Cal.3d 527 (1982), the defendant Richard Bozek, had filed a suit against the City of Long Beach and two City of Long Beach police officers for false imprisonment, false arrest, negligent hiring assault and battery. A jury returned a verdict in favor of the City of Long Beach and in favor of City of Long Beach and in favor of the two

police officers. The City of Long Beach and the two police officers then instituted an action against Richard Bosek for malicious prosecution. Id. at 530. The Bosek Court noted that "the right of petition, like other rights contained in the First Amendment and in the California Constitutional Declaration of Rights, is accorded 'a paramount and preferred place in our democratic system.'" Id. at 532. The Court also noted (and as was pointed out above, the petitioner himself had also noted in his opening brief) that the First Amendment right of petition is intimately connected in origin, purpose and use with the other First Amendment rights of free speech and free press. Thus, it is afforded as high a preferred place in our democratic system as the other First Amendment rights of free speech and free press. Id. at 532 and 536.

The Bosek Court went on to carefully distinguish between the constitutional impact of suits brought by a public entity and a suit,

based upon the same set of facts, brought by an aggrieved public employee. The Supreme Court held that:

> "In order to avoid the chilling effect upon the constitutional right of petition which would result if we were to allow municipalities to maintain actions for malicious prosecution, we conclude the best course is to defer to the legislatively provided remedy [of allowing a municipality to recover costs of suit, including reasonable attorneys' fees, against a plaintiff who field a suit in bad faith and without reasonable cause.] An award of expenses of suit by the trial court in an initial action would fully compensate a municipality for its expenses of defending suit. The availability of such an award in combination with the criminal

> sanctions provided in Penal Code §72 for the filing of false claims with the government and the possibility of malicious prosecution actions by individual City employees -- here the police officers -- provide an adequate deterrent to unwarranted lawsuits without unduly infringing upon the right of petition."

Id. at 538 (emphasis added).

This holding represents a repudiation of the very argument being advanced by the petitioner -- that police officers who attend a public meeting in connection with their job duties are merely extensions of the government and, therefore, have no greater right in maintaining a civil action than does the government itself. The Bozek Court deals even more directly with the issue in footnote 9 of the decision. While discussing civil suits maintained by police officers as individuals through their privately employed counsel, the

Court made the following observations:

> "We note, however, that such suits are different from suits by governmental entities themselves in at least two important ways: First, police officers have an interest in recovering damages for harm to their reputations and for emotional distress caused by lawsuits alleging improper conduct ont heir part. Second, suits by police officers do not necessarily raise the specter of a retaliatory policy designed to discourage legitimate exercise of the right of petition through the courts."

Id. at 538, fn. 9.

The Supreme Court clearly recognized that public employees have an interest separate and apart from their governmental employers and as individuals are themselves entitled to the rights and protections guaranteed by the

Constitution and the laws of California. It is important to remember that in stating the positions above, the Bozek Court was dealing with a situation where a police officer was performing job related duties when he took his actions against the defendant and that the Supreme Court also considered the impact of a police officer's civil action upon First Amendment rights. Despite these facts, the Bozek Court pointed out that civil suits by police officers should be allowed and that these suits would not "unduly infringe upon the right of petition." Id. at 538.

The petitioner attempts to evade the Unruh Act by stating that Richard Long attended the meeting in connection with his duties as a police officer. However, under California law, a police officer is always on duty. Several Courts, including the California Supreme Court, have recognized that in exercising the authority vested in a police officer under Section 831 of the California Penal Code, police officers have

duties which extend beyond the period of time for which they are actually paid. See, People v. Corey, 21 Cal.3d 738, 746 (1978); and People v. Derby, 177 Cal.App.2d 626, 630-31 (1960). Moreover, Section 142 of the Penal Code imposes criminal penalties on a police officer, who, at any time day or night, refuses to receive or arrest a person who has committed a criminal offense. Since a police officer must thus always be considered on duty, the petitioner would always argue that a police officer can never be considered as an individual separate and apart from his governmental employer.

What the petitioner is really asking is for a ruling which would allow any business organization, like the ACLU, to exclude a person for no other reason than the nature of his employment. Under this rationale, other public employees would be put in this unhappy category of being disenfranchised from the civil rights enjoyed by all other residents of California. For instance, City Attorneys, City Risk

Managers, Judges, and District Attorneys frequently attend public meetings in connection with their job duties and take notes of what is being said at the meeting. Under the petitioner's rationale, these people could also be ejected from a public meeting and would have no redress since they are no more than extensions of the governmental entity for which they work. In fact, in the extreme, any governmental employee who goes to eat at a restaurant in connection with his job duties, could be excluded from the restaurant solely on the basis of his employment and that governmental employee would have no redress for this arbitrary discrimination. This Court cannot condone a rationale which will lead to such absurdities.

In addition, since when have the Courts ever condoned self help. The petitioner took it upon himself to eject Richard Long from a public meeting. Assuming for the sake of argument that the petitioner had a concern to

protect his First Amendment rights and that is why he ejected Richard Long from the meeting (please keep in mind that the jury made a conclusive finding that he does not have such a motive when he ejected Richard Long from the meeting), the Courts would still not sanction that activity. The Courts have never sanctioned self help. For example, the Courts have never allowed a person to go over to a neighbors house and beat the neighbor up because they felt the neighbor was being too noisy late at night. The proper course of action would have been to seek an injunction preventing Richard Long, or any other police officer from the City of Newport from attending a public meeting sponsored by the ACLU in the City of Newport.[1]

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[1] In fact, the ACLU did seek an injunction for that very purpose and submitted the matter to the trial court upon stipulated facts. The trial court denied that injunction. It is interesting to note that the ACLU stipulated that it had found no evidence during its discovery in that case that the Newport Beach Police Department had, at any time relevant to that action, maintained files or dossiers on persons, groups or organizations

The petitioner's attempt to utilize the case of White v. Davis, 13 Cal.3d 757 (1975) to justify his position. However, even the petitioner points out the fact that White v. Davis is not really on point, yet they attempt to state there are sufficient similarities to make that decision instructive in the case at bar. (See Petitioner's opening Brief, p.72.) White v. Davis is in fact not on point at all and is not instructive for this case.

White v. Davis was a ruling which was expressly and specifically directed at ongoing covert police surveillance of a university classroom. The White ruling does not address

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engaged in lawful non-violent activity. In addition, that ACLU stipulated that the discovery in that action did not reveal any evidence that the Newport Beach Police Department had, at any time relevant to that action, a policy of surreptitiously monitoring or surveilling the activities of any individual, group or organization, unless the activity was directly related to criminal conduct or was unrelated to legitimate police functions. [Appendix 262-268] This stipulated fact document was discussed with the trial court below during the non-suit motion.

itself to all governmental activities, but specifically arises from the Court's special concern for the effects of ongoing covert surveillance upon university classrooms and their environs. Id. at 768. The court noted this special concern for the university setting and the specificity of its holding when it noted that:

> "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teacher's [and student's] concern. That freedom is there for a special concern of the First Amendment, which does not tolerate laws which cast a pall or orthodoxy over the classroom. . . . The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to the robust exchange of ideas which discovers

truth 'out of a multitude of tongues, [rather] than through a kind of authoritative selection.'"

Id. at 769 (emphasis added).

Quoting from a decision authored by Justice Frankfurter, the court noted that the dependence of a free society on free universities "means the exclusion of governmental intervention in the intellectual life of the university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indisposable for fruitful academic labor. . . ." White v. Davis, at 770 (emphasis in original).

The White decision represents a special factual situation which is in no way comparable to the case at bar. When a police officer attends a meeting which is advertised as being open to anyone, and where there is never any indication that a particular class of

individuals is not welcome to the meeting, out of a concern for good police-community relations for the purpose of hearing possible complaints about the policies and practices of the police department, this does not amount to a violation of the constitution. In addition, Richard Long was well-known in the community as the community Programs Officer, wore a conspicuous name tag during the entire conference, made numerous appearances on television just prior to the conference, identified himself to Ron Talmo and discussed his purpose for being at the conference during the conversation with Ron Talmo, and was never told by anyone that his presence at the conference was not wanted; until he was ejected from the conference some four house after the conversation with Ron Talmo. The facts of this case simply do not relate at all to the very special circumstances which gave rise to the holding in the case of White v. Davis.

According to the California Supreme

Court, "the freedom to pursue [a] declared right on an equal basis is just as precious as many other freedoms and rights. The exercise of the power of its denial, being a restraint on a personal right, is circumscribed by the same constitutional safeguards of equal protection and due process as are other restraints under penal laws." Orloff v. Los Angeles Turf Club, 36 Cal.2d 734, 739 (1959). If the Unruh Act is viewed as prohibiting any arbitrary class discrimination, it must be viewed as being designed to protect the interests of police officers just as it is viewed as being designed to protect the interests of other citizens of the State of California.

III. REQUEST FOR ATTORNEYS' FEES ON APPEAL

Pursuant to the Unruh Act a person who has discriminated arbitrarily against another person is liable for damages and for attorneys' fees. California Code of Civil Procedure §52. An Appellate Court has the power to fix

attorneys' fees on appeal, when they are authorized by statute. See B. Witkin, California Procedure, Vol. 9, Section 673, p. 648 (3rd Ed. 195). It appears however, that the better practice is to have the trial court determine attorneys' fees when it determines costs on appeal. Security Pacific National Bank v. Adamo, 142 Cal.App.3d 492, 498 (1983).

IV. CONCLUSION

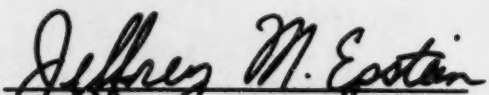
As was cogently stated by the United States Supreme Court in the case of California Motor Transport, "First Amendment rights may not be used as the means or pretext for achieving 'substitute evil'. . .which the legislature has the power to control. . .if the end result is unlawful, it matters not that the means used in violation may be lawful." 404 U.S. at 515. This Court cannot validate the appellants claim that they are insulated from liability because they exercise their First Amendment rights when ejecting Richard Long from the conference. The

end result was unlawful and it matters not that the means used to violated the Unruh Act may have been lawful. This court must uphold the judgment below.

Dated: August 17, 1990

Respectfully submitted,

LAW OFFICES OF
JEFFREY M. EPSTEIN

BY: 
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